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A
SELECTION OF CASES
ON
CARRIERS
AND
OTHER BAILMENT AND
QUASI-BAILMENT SERVICES

BY
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SECOND EDITION

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CASES ON THE LAW OF CARRIERS.

HISTORICAL INTRODUCTION.

PRIOR OF BRINKBURN *v.* WILLIAM DE WHELPINGTON.

NORTHUMBERLAND *ITER coram* METINGHAM, J., 1299.

[*Brinkburn Chartulary*, 105.]

WILLELMUS [de Whelpington] summonitus fuit ad respondendum Priori de Brinkeburne de placito quod reddat ei tres cartas, quas ei injuste detinet. Et unde queritur quod cum praedictus Prior tradidisset eidem Willelmo tres cartas . . . apud Brinkeburne custodiendas et eidem Priori liberandas cum ab ipso fuerit requisitus, praedictus Willelmus praedictas tres cartas dicto Priori reddere contradixit, licet saepius super hoc fuerit per ipsum Priorem requisitus, et adhuc reddere contradicit, unde dicit quod deterioratus est et ad dampnum habet ad valentiam viginti marcarum. Et inde producit sectam.

Et W. venit, etc., et bene cognoscit praedictas cartas ei fuisse, sicut praedictus Prior asserit, liberatas eidem Priori liberandas cum illas petierit. Set dicit quod die Sabbati proxima post festum Sancti Johannis Baptistae anno regni Regis praedicti, latrones ignoti ad domum suam apud Whelpington noctanter accesserunt, ac bona et catalla sua simul cum duabus cartis ibidem inventis ceperunt et asportaverunt, et impressionem sigillorum de duabus cartis abstraxerunt, et scripta ibidem reliquerunt, quas hic in Curia profert. Et tertiam cartam integram . . . eidem Priori liberavit.

Et praedictus Prior per Willelmum de Denum, attornatum suum, hoc idem cognoscit, et praedictas duas cartas sic contrafactas hic in Curia admisit, et bene concedit illas eodem modo quo praedictus W. asserit fuisse per latrones ablatas.

Ideo praedictus Willelmus quietus, etc.

Y. B. 8 Ed. II., 275 [1315]. William le Bonion, Clerk, brings his writ of Detinue of Chattels, against one Maude, and counted that he detained from him wrongfully, etc., the said, etc., that is to say, rings, a silver vessel, and other jewels.

Migham. Sir, we tell you that this same W. bailed us to guard a locked chest without the key, and he carried off the key himself, and

whether other things were stolen, as he says, we do not know ; and we tell you that thieves came at night and broke into the chamber of this same Maude, and carried off the chest with the chattels and broke it open, and carried off our goods and chattels with it, ready, etc.

Russell. That he bailed to you the jewels aforesaid outside the chest, and desired you to return them at his will, ready, etc. *Et alii quod non.*¹

Y. B. 12 & 13 Ed. III. 244 [1339]. Detinue of chattels to the value of 100*l.* against an Abbot by a man and his wife, on a bailment, made by the father of the wife when she was under age, of chattels to be delivered to his daughter, when she was of full age, at her will ; and they counted that he delivered pots, linen, cloths, and 20*l.* in a bag sealed up, etc.

Pole. He demands money, which naturally sounds in an action of debt or account ; judgment of the count.

Stouford. We did not count of a loan which sounds in debt, nor of a receipt of money for profit, which would give an action of account, but of money delivered in keeping under seal, etc., which could not be changed ; and if your house were burnt, that would be an answer.

SCHARDELOWE, J. Answer over.

Pole. We do not detain in manner as he has counted ; ready to defend by our law.

Stouford. We have counted of the bailment made by another ; wherefore, do you intend this to be your answer ?

Y. B. 22 Lib. Assis. pl. 41 [1348]. I. de B. complains by his writ that G. de F. on a certain day and year at B. upon Humber had undertaken to carry his mare taken on his boat over Humber water safe and sound ; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished, to his wrong and damage, etc.

Richmond. Judgment of the writ : for he does not allege any tort in us ; he only proves that he would have an action by a writ by way of covenant, or [not ?] by way of trespass : wherefore, etc.

BANKWELL, J. It seems that you committed a trespass when you overloaded the boat, whereby his mare perished, etc. ; therefore answer.

Richmond. Not guilty.²

Y. B. 29 Lib. Ass. 163, pl. 28 [1355]. Suit was brought in the Exchequer by the King's debtor, etc., for a cup which was bailed by him to the defendant, etc. And the defendant said, that the plaintiff bailed

¹ Certain obvious errors in this case have been corrected from the version given in Fitzherbert's Abridgment, Detinue, pl. 59. That version ends as follows : "*Russell.* Not carried away by thieves, ready, etc. *Et alii e contra.* And to this issue the party was driven, etc." — Ed.

² See 41 Ed. III. 3, pl. 8. — Ed.

the cup to him in pledge for certain money, etc., and he put it with his own goods. etc., which were stolen from him. To which the plaintiff was driven to answer: who said, that he tendered the money before the theft, and the defendant refused it, judgment, etc. And he tendered averment that he did not tender before taking; and the other was driven by award to aver the tender before the theft, etc. For W. TROORE, B., said, that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged, etc. *Quod nota.*

Cutesby in Y. B. 2 R. III. 14, pl. 39 [1478]. By this action he asks nothing but an account, which clearly disaffirms property, etc.; for may be that in a writ of account the plaintiff shall recover nothing; for if the thing delivered was of the value of 20*l.*, if the defendant alleges upon his account that he adventured by land and was percase robbed, or on sea and lost, if it be found so, the plaintiff shall recover nothing; for he demands nothing but an account, and more he shall not have, be it more or less.

THE INNKEEPER'S CASE.

COMMON PLEAS, 1410.

[Y. B. 11 Hen. IV. 45, pl. 18.]

A MAN brought a writ of Trespass against an innkeeper, and declared that by the Common Law each innkeeper is obliged safely to keep the things which are within his inn; and declared that he was lodged with him at a certain time, and that his horse was stolen while within the inn.

Skrene. Protesting that we are not a common innkeeper, we say that the plaintiff came to us towards night and prayed to be received into our house; and we told him that we could not be bound to him, because early the next morning we had to be before the sheriff, to extend certain lands by the King's writ. And thereupon he prayed us to give him a key of his chamber, and another of the stable where he should put his horse; and we gave him those same keys, and went our way that same night. And we pray judgment if he may maintain this action against us, etc.

Tildesley. Protesting that we do not admit that he gave us such notice of his going away as he has spoken of until after we were lodged with him, and that meanwhile our horse had been stolen from within his inn, we pray judgment, and ask for our damages. *Et sic ad iudicium.*

HANKFORD, J., to *Skrene.* You have not alleged that you were summoned or distrained to come before the sheriff, nor in fact have you alleged that you went to the sheriff and gave attendance upon him by authority of the law; but you have said only that you gave notice to the plaintiff that you were going: and if you were not there, he may

have a traverse of it. And though a common innkeeper make promise by his own head to speak with a sheriff or other man, if he suffers one to lodge with him he answers for his goods; and he is bound to have deputies and servants under him, for well keeping the inn during his absence.

Skrene. When I alleged such notice given to him as to what I had to do before the sheriff, it is to be taken as true in fact, since it is not traversed by the other party.

HILL, J. The bailment of the keys in this case is nothing to the purpose in discharging the innkeeper, as was adjudged long before his day (*quod fuit concessum per Justiciarios*); but when the defendant gave notice to him that he could not attend to him *causa ut supra*, and thereupon the plaintiff took lodging at his peril, he discharged the innkeeper, and took the charge upon himself; wherefore, etc.

THIRNING, C. J. The plaintiff in this case in his declaration has not declared that it was a common inn. Nothing is alleged of record in proof of it, but in the declaration he has declared the common custom as to common inns, and then in the conclusion he has alleged nothing, but that he was lodged with him, so the matter in itself is not sufficient to maintain the action; for though a man who is not a common innkeeper lodge me in his inn, he shall not answer for my goods.

Quod fuit concessum. *Nota* this reason.

Tremayne. When I declared that I was lodged in his inn, it is intended that he is a common innkeeper.

THIRNING, C. J. An action cannot be maintained by argument nor by intendment, but by sufficient matter included and declared. Wherefore it is better for you that your writ be abated for defect of your declaration, and that you pursue a better action.

Tremayne. He has accepted our declaration as good, wherefore, etc.

HANKFORD, J. No matter if he has accepted anything, the court does not allow it.

Then the record was read, and found as Thirning had said, etc.

HANKFORD, J. (ex assensu omnium sociorum). You take nothing by your writ, etc., but you are in mercy, etc.

HORSLOW'S CASE.

COMMON PLEAS, 1444.

[Y. B. 22 Hen. VI. 21, pl. 38.]

WRIT of trespass on the case was brought against W. Horslow, laborer, because the Common Law of the land is that the innkeepers who keep common inns ought to safeguard the goods of those who are lodged in their inns, so that no damage should happen to them by persons unknown; and the plaintiff alleged how certain of his goods (and alleged

what) were taken out of his possession in the defendant's house by persons unknown.

Prisot. Judgment of the writ; for the writ is, *Cum secundum legem & cons. Regni*, etc., in which case it appears that the matter aforesaid lies in custom, which shall not be intended the Common Law, etc.

NEWTON, C. J. What is custom of the land but the law of the land? Therefore answer this.

Markam. In Kent perhaps the writ does not rehearse their customs, sc. *cum secundum Legem & consuetudinem*, etc., because they have divers customs which do not extend except within said county, but this is a custom and a law throughout all the realm.

Prisot. Yet judgment on the writ; for the custom is rehearsed as of common inns, and by the writ and count it is not alleged that the defendant's house in which the goods were taken is a common inn; wherefore may be it is not a common inn; and if one be lodged with me, or in the house of a husbandman who is not a common innkeeper, though his goods are taken out of his possession, still he lacks an action.

NEWTON, C. J. The exception is good, and will be corrected at another day.

Markam. We will waive this writ, and take another.

Brown. This writ is good, and the practice no other: and cited two or three precedents.

Prisot. All those writs are *Pone*, etc., such a one, innkeeper, and can be understood no otherwise except that his house is a common inn; but in the case at bar the defendant is not named innkeeper, but W. Horslow, laborer.

Brown. The addition should not be given in this action, because process of outlawry does not lie in said action.

NEWTON, C. J. A laborer may hold a common inn, and *e contra* an innkeeper may have other houses to lodge with his license and good will.

Prisot. If action be brought against the Warden of the Fleet or the Marshal in the King's Bench because of their office, they should be named in their writ by the name of their office; so it seems in the case at bar, the defendant should be named innkeeper.

NEWTON, C. J. In the case you have put the law is as you say; but I may have a common inn and yet such a writ brought against me by my own name is good. And in the case at bar if the house was not a common inn you may suggest it and take advantage of it by way of plea.

ASCUE, J. It seems for another reason that the writ is abatable; for the writ does not mention that the goods were carried into the inn and lodged in it, and carried out of said inn; but the writ is, C. shillings, etc., of the plaintiff *in hospicio* of the defendant *hospitati ceperunt & asportaverunt*, and this word *hospitati* refers to the person of the plaintiff and not to the hundred shillings; for then it would be *hospitantes vel hospitatos*; and it may be by the writ that the plaintiff might lodge in the house of the defendant and that the goods were in the house of another person and carried away; wherefore it seems that the

writ should be, *ibidem inventos cepit & asportavit*. And for this reason they were adjourned. And at another day the writ was held good, etc.

Prisot. You ought not to have an action, for we ourselves delivered to the plaintiff a chamber and a key to it to have and hold in his care to safeguard his goods; and we say that the plaintiff brought with him certain persons unknown into his chamber, who took the said goods. Judgment if action.

Markam. That plea amounts to no more than that the goods were not taken in your default.

NEWTON, C. J. The plea is good, if he give names in certain to those who took the goods; for the persons are unknown to him, and for such a taking the law excuses him.

Wherefore *Prisot* alleged their names, sc. Tho. T. and W.

Markam. Said T. & W., whom we carried with us into the chamber did not carry away the goods.

NEWTON, C. J. That is a negative pregnant; one, that they did not carry away the goods; the other, that they did not come into his chamber at his request; but the plea is good, that the said W. and T. did not carry away said goods; or else you may deny that the said W. and T. came into the said chamber at your request.

Prisot. To oust ambiguities we say that the goods were not carried away in our default.

FULTHORPE, J. That is no issue.

Brown. Such an issue has been taken and entered before this time. And afterwards *Prisot* pleaded the first bar, as above.

Markam. We did not carry said W. and T. with us into the chamber, ready. *Et alii e contra*.

Markam. Still this is perhaps a jeofail. Suppose I with my good will suffer a stranger to lodge with me in the inn, and in my chamber, which stranger robs me, and I do not know him, shall not the innkeeper be charged with it?

NEWTON, C. J., and All the Court. No, sir, when he was not lodged in your chamber by the innkeeper, but by your own sufferance; but if he was lodged with you by the innkeeper, then the innkeeper shall be charged. And suppose that your own servant who is with you in the inn robs you, shall the innkeeper be charged? Certainly not. Therefore the issue is good.

THE MARSHAL'S CASE.

COMMON PLEAS, 1455.

[Y. B. 33 Hen. VI. 1, pl. 3.]

DEBT was brought against the marshal of the King's Bench. And the plaintiff counts on the Statute, and that one T. who was condemned to the plaintiff in a certain sum in an Assize of Novel Disseizin sued a

writ of Error before the King; and then the judgment was affirmed, and the said T. was put in guard to the Marshal for the sum; and that he let him go at large, to his wrong and damage.

Choke. No action lies; for he says that a great multitude of the King's enemies on such a day and year came to Southwark and they then broke open the prison of our Lord the King, and took the prisoners then therein out of the prison, to wit the said T. and others, and carried them away against the will of the Marshal; without this, that he let him go at large *aliter vel aliquo alio modo*.

Billing and Laicon. To this plea pleaded in manner, etc.

Choke. If enemies from France or other enemies of the King were here, the Marshal would be discharged; as if they had burned a house of a tenant for life, he should be discharged of waste; or otherwise if the house were burned by a sudden tempest, then he would be discharged; so here.

DANBY, J. In your case of the King's enemies and of the sudden tempest it is right; for then there was no remedy against any one; but it is otherwise where subjects of the King do it; for there you may have action against them.

Choke. Sir, the Captain is dead, and all the others are unknown.

PRISOT, C. J. If they were subjects of the King, they could not be called enemies of the King, but traitors; for enemies are those who are out of his allegiance; but if they were alien enemies it would be a good plea without any doubt. But if there were twelve or twenty subjects of the King, and unknown, and one night they broke open the prison and took them out, etc., in that case the Marshal shall be charged for his negligent guard; so here. But if it were by a sudden accident with fire, and the prison were burned, and they escaped, perhaps it is otherwise.

Choke. If a stranger comes to my house, and by his folly burns it, so that other houses of my neighbor are burned, I shall not be charged with burning my neighbor's house. And, sir, if a subject of the King joins with enemies of the King like that, and then they come here and do such a thing, it shall be taken as a thing done by the King's enemy.

PRISOT, C. J. In your case he shall not be taken prisoner here, and [allowed] to make ransom as an enemy may; but he shall be taken as traitor to the King.

Choke. Then we say that there were 4,000 Scots and other enemies of the King with the other traitors, etc.

DANBY, J. Then you ought to allege the matter more specially, and some of their names. *Et adjournatur.*

Broke's Abridgment, Detinue, 27 [1469]. Account. *Jenny.* If I bail goods to you and you are robbed of them, that shall excuse you. DANBY, C. J. If he receives them to keep as his own goods, then it is a good excuse; and otherwise not.

THE SHEPHERD'S CASE.

KING'S BENCH, 1487.

[Y. B. 2 Hen. VII. 11, pl. 9.]

THE case was such. A man had a hundred lambs to keep, and negligently through his default they were destroyed by his sufferance.

Read. It seems that the action does not lie; for action on the Case does not lie for a nonfeasance, for the party shall have a writ of Covenant for it. For if one has cloths to keep and they are motheaten or rotted, no action on the Case lies, but action of Detinue.

Wood. It seems to me that the action well lies; for suppose one takes upon himself to carry glass or pots, and negligently breaks them, I shall have action on my Case, etc.

Keble said that nonfeasance shall not give rise to action on the Case; for before the Statute of Laborers if a servant who was hired would not do service to his master no action lay for his nonfeasance, etc.

And it was argued, that if any act be done by the party, then action will lie well enough. As if I bail a chest with obligations, and he breaks into it, or bail a horse to ride ten leagues and he rides twenty, action on the case lies; or in this case if the party had driven the lambs into the water action on the case would lie.

TOWNSEND, J. When the party undertook to keep the lambs, and afterwards allowed them to be destroyed by his default, since he had taken them and executed his bargain, and had them in his custody, and then did not attend to them, action lies. For here is his act, sc. his agreement with the undertaking, and this afterwards is broken on his part, and this shall give rise to the action. And suppose a horse be bailed to a man to keep, and afterwards he does not give him sustenance, whereby he dies, action on the case lies. Or if a carrier takes my goods to carry, and afterwards he loses or breaks them, action lies to make him answer for it, because he has not executed his bargain, and has taken upon him to do the thing. But if a covenant were made with me to keep my horse or to carry my goods, and it was not done, now action of Covenant lies, and no other action; for in those cases he never executed his promise.

Y. B. 10 Hen. VII. 26, pl. 3 [1495]. *Keble (arguendo).* I bail deeds and evidences to a man to guard generally. Now if his own goods and the evidences are stolen, he shall be excused towards the party, as I understand, for this keeping is chargeable to him to all intents as reason may expound, as I shall keep my own goods, etc. . . .

FINEUX, J. To the contrary, and denied the case of bailment of goods, and said that the bailee should be charged as he understood, though his own goods were stolen.

Fisher. To the same intent; and said as an innkeeper has the keeping of the goods; he shall be charged notwithstanding they are stolen, and he has no remedy over; so here.

Doctor and Student, c. 38 [1518]. It is commonly holden in the laws of England, if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed; or if he overcharge a horse whereby he falleth into the water, or otherwise, so that the stuff is hurt or impaired; that he shall stand charged for his misdemeanor: and if he would percase refuse to carry it, unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like.¹

FITZHERBERT, *Natura Brevium*, 94 d [1534]. If a smith prick my horse with a nail, etc., I shall have my Action on the Case against him, without any warranty by the smith to do it well. . . . For it is the duty of every artificer to exercise his art rightly and truly as he ought.

DALL. 8 [1553]. Note by BROWNE, J., and PORTMAN, J. As clear law; if a common carrier takes a pack of stuff from a man to carry it to D. and while in a common inn the pack is taken and stolen, the owner for this shall have an action against the innkeeper for the stuff and the carrier shall not; for they are not the goods of the carrier, nor shall he be charged with them inasmuch as he was by law compellable to carry them; and it is not like where one takes goods to carry generally, for if he be robbed, it shall be charged to the carrier for his general taking, to which he was not compellable, and so he shall have action over in respect of his liability. And 2 H. IV. the master shall have action for his goods robbed from his servant in an inn, and although there was not a direct writ for the master in the register in this case, still by the statute the clerks agree to make a writ for him; and if it pass the Chancery it is well enough. HALES, J., acc.

ANONYMOUS.

COMMON PLEAS, 1558.

[*Moore*, 78, pl. 207.]

ONE came to an inn, and the innkeeper said to him, "here are persons resorting to this house, and I know nothing about their behavior; therefore take the key of such a chamber and put your goods there at your own risk, for I will take no responsibility for them;" and afterwards the goods were stolen. The party brought action on the Case against the innkeeper.

Wray. The innkeeper is responsible by the law for all the goods which come to his inn; and by the law he cannot discharge himself by such words.

¹ Noy (*1634), Maxims, *92, repeats this. — Ed.

Harper. We will demur.

BROWNE, J. Then we will quickly make an end of it.

Harper. My client has instructed me in this way, and I have no more to say.

BROWNE, J. You have the more to pay; the innkeeper may take issue, that the goods were not stolen by his negligence.

ANONYMOUS.

QUEEN'S BENCH, 1589.

[1 *Harvard Manuscript Reports*, 3a.]

It was held by all the Justices in the Queen's Bench, that if a man bail certain cloths to a tailor to make a robe of them, who does so, and then it is stolen out of his shop, still he shall be accountable for it; the same is law of a carrier who has anything for his labor. But it is otherwise of him who has nothing for keeping it, but keeps it of his good will.

WOODLIFE'S CASE.

QUEEN'S BENCH, 1597.

[*Moore*, 462.]

IN account upon merchandise delivered for merchandising, the defendant said that he was robbed of this merchandise, and of divers other goods and chattels of his own.

POPHAM, C. J. It seems a good plea.

GAWDY, J., *e contra*. It is no plea for a carrier, because he is paid for the carriage.

POPHAM, J. But it is a good plea for a factor, servant, and the like.¹

MOSLEY v. FOSSET.

QUEEN'S BENCH, 1598.

[*Moore*, 543.]

ACTION on the case, and declares that the defendant took from the plaintiff a gelding to agist him for 2s. a week, and the defendant

¹ The same case is reported in 1 Rolle's Abridgment, 2, as follows: "If a man deliver goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitly took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed." — ED.

was to keep him safely and redeliver when he should be asked to do so: and alleges that he so negligently kept him that he was taken by persons unknown. The defendant demurred, and the Justices were divided, two against two: POPHAM, C. J., and FENNER, J., that the action does not lie without alleging request for redelivery, and also alleging how the horse was taken away, dead, or lost. GAWDY and CLENCH, JJ., *à contra*, because the action is founded on the negligence and the special assumpsit to keep safely. But all agree that without such special assumpsit the action does not lie.

SOUTHCOTE'S CASE.

QUEEN'S BENCH, 1600.

[4 Coke, 83 b.]

SOUTHCOTE brought *Detinue* against Bennet for certain goods, and declared, that he delivered them to the defendant to keep safe; the defendant confessed the delivery, and pleaded in bar that after the delivery one J. S. stole them feloniously out of his possession: the plaintiff replied, that the said J. S. was the defendant's servant retained in his service, and demanded judgment, etc. And thereupon the defendant demurred in law, and judgment was given for the plaintiff:¹ and the reason and cause of their judgment was, because the plaintiff delivered the goods to be safe kept, and the defendant had took it upon him by the acceptance upon such delivery, and therefore he ought to keep them at his peril, although in such case he should have nothing for his safe keeping. So if A delivers goods to B generally to be kept by him, and B accepts them without having anything for it, if the goods are stole from him, yet he shall be charged in *Detinue*; for to be kept and to be kept safe, is all one. But if A accepts goods of B to keep them as he would keep his own proper goods, there, if the goods are stolen, he shall not answer for them: or if goods are pawned or pledged to him for money, and the goods are stolen, he shall not answer for them, for there he doth not undertake to keep them but as he keeps his own; for he has a property in them and not a custody only, and therefore he shall not be charged as it is adjudged in 29 Ass. 28. But if before the stealing he who pawned them tendered the money, and the other refused, then there is fault in him; and then the stealing after such tender, as it is there held, shall not discharge him; so if A delivers to B a chest locked to keep, and he himself carries away the key, in that case if the goods are stolen, B shall not be charged, for A did not trust B with them, nor did B undertake to keep them, as it is adjudged in 8 E. II. *Detinue*, 59.

¹ Per GAWDY et CLENCH, JJ., *ceteris absentibus*: see s. c. Cro. Eliz. 815. — ED.

So the doubt which was conceived upon sundry differing opinions in our books in 29 Ass. 28. 3 H. VII. 4, 6 H. VII. 12, 10 H. VII. 26 of Keble and Fineux, are well reconciled, *vide* Braet. lib. 2, fol. 62 b. But in accompt it is a good plea before the auditors for the factor, that he was robbed, as appears by the books in 12 E. III. Accompt, 111, 41 E. III. 3, and 9 E. IV. 40. For if a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandise the best that he can, and a servant is bound to perform the command of his master: but a ferryman, common innkeeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves, *vide* 22 Ass. 41 Br. *Action sur le Case*, 78. And the Court held the replication idle and vain, for *non refert* by whom the defendant was robbed, *vide* 33 H. VI. 31a. b. If traitors break a prison, it shall not discharge the gaoler; otherwise of the King's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other not. *Nota* reader, it is good policy for him who takes any goods to keep, to take them in a special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance. So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged upon his general acceptance, which implies that he takes upon him to do it.

MORSE v. SLUE.

KING'S BENCH, 1671-72.

[2 *Keb.* 866, 3 *Keb.* 72, 112, 135: 1 *Vent.* 190, 238: *T. Raym.* 220: 2 *Lev.* 69: 1 *Mod.* 85.]¹

AN action upon the case was brought by the Plaintiff against the Defendant; and he declared, That whereas, according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without loss or substruction, *ita quod pro defectu* of them, they may not come to any damage; and whereas the 15 of May last, the defendant was master of a certain ship called the *William and John*, then riding at the Port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pair of silk stockings and 174 pounds of silk,

¹ The declaration and the special verdict are taken from the report by Ventris; the rest of the case is as reported by Keble.—ED.

by him to be transported for a reasonable reward of freight to be paid, and he then and there did receive them, and ought to have transported them, etc., but he did so negligently keep them, that in default of sufficient care and custody of him and his servants, 17 May, the same were totally lost out of the said ship.¹

Upon Not guilty pleaded, a special verdict was found, viz.:

That the ship lay in the River of Thames, in the Port of London, in the Parish of Stepney, in the County of Middlesex, *prout*, etc. That the goods were delivered by the plaintiff on board the ship, *prout*, etc., to be transported to Cadiz in Spain. That the goods being on board, there were a sufficient number of men for to look after and attend her, left in her. That in the night came eleven persons on pretence of pressing of seamen for the King's service, and by force seized on these men (which were four or five, found to be sufficient as before) and took the goods. That the master was to have wages from the owners, and the mariners from the master. That she was of the burthen of 150 tons, etc.

So the question was, upon a trial at bar, whether the master were chargeable upon this matter.

Holt, for the Plaintiff. The master receives these goods generally to keep, as 4 Co. 83, Southcot's Case; Co. Lit. 89; and only guardian in socage who hath the custody by law, and factor who is servant at the master's dispose, and so cannot take care, are exempt.

2d. The master is to have a reward for his keeping and therefore the proper person against whom the action should be is he. This is the reason (2 Cro. 188, *Jelly and Clerke*) of a Carrier, hoyman, and innkeeper: thus *Moore*, 876, pl. 1229, and in *Hob.* 18, *Rich and Needham's Case*. And though the master hath his salary from the owners, yet the contract for freight is made by the master in his own name with the merchant, and the master is to do that which is consequence of it, to keep the goods. And were he a servant (*Doctor & Student*, 137), if he contract in his own name (*Dyer*, 230, 2 Cro. 250, *Yelv.* 137, pl. 194) he is the principal debtor. Also in the Civil Law *exercitor navis* takes no care of freight, therefore this master is but a servant, and the action against him only *exercitoria*, because the owner took all the care to lade and freight wine; as *Plowd.* 827. But the *exercitor* now is *per aversionem* the master who takes care of all.

3d. The master of the ship hath a remedy over against the wrongdoers, as *Lit. Co.* 54, on permissive waste. So gaoler (33 Hen. VI. 1) on traitors breaking prison. Also the master he may have trespass or an appeal of robbery, and on a fresh suit (*Keil.* 70) he shall have restitution, and the damages recovered by the master shall bar the owners; so *Haydon and Smyth*, 13 Co. 69. Also the mischief is great if no action lie, by reason of the great trust merchants put in the master, and and therefore he need not prove any particular defaults (as *de lege Nautica*, *Plowd.* 3, 15, 29, and in *Antonius Fogassa*, 822), though the

¹ There appears to have been a second count in case as against a mere bailee, for negligence in not guarding the goods. 2 Keb. 866.—Ed.

injuries happen without the master's default, *miles fatale divum accideret*, *Lex Mercatoria*, 103. Also the bills of lading show this, "that the goods well received are to be redelivered, the dangers of the sea only excepted," which cannot be foreseen nor avoided; and this differs from piracy, which (as Loccenius, 121, and 3 Inst. 112) is a danger at sea or common enemies (and Loccenius *de jure maritimo*, 140, *Strecka de mercatura*, 448). Also here is a neglect in the master having no greater guard than four; which is found to be the usual number, but not by time out of mind, or by custom or prescription. Also the men that robbed were permitted to enter, but it was found they pretended to be press masters.

Wilmington, for the Defendant. 1st. That here is no such neglect as to ground an action upon; the declaration being on the custom of England, as against innkeeper, carrier, etc. (Register, 105, and F. N. B. 94 b), yet in neither is there any precedent against master of the ship nor other, but what is grounded on wilful or legal neglect. And this nonfeasance and want of sufficient numbers cannot be a neglect in law (as 8 Co. 33, *Calye's Case*, 4, resolved; 22 Hen. VI. 21 and 38; 2 Hen. IV. 7 b; *Dyer*, 158 and 266, *Spencer's Case*; and Hil. 32 Eliz. 1, Roll. 3 and *Moore*, 462, pl. 650, *Woodlif's Case*); for he that loseth these goods is not to pay the defendant anything, but to the owners of the ship, whose servant the master is *pro hac vice*; and in *Hob.* 17 a reward is expressly averred to be given to the hoyman, and the master's possession is the owners'. Also here is a custom found that four was the usual number, which in verdict is sufficient without saying time out of mind (*Lit. Co.* 182). Also (*Wellwood's Abridgment*) the duty of the master of the ship is only to look to the goods, but not to answer for them.

2d. Supposing a neglect on which the merchant should have remedy, it lyeth not against the master but against the part owners, here being no charter-party found; whereby if the master be partner he is liable, but else the master is a bare servant, and sueth owners for salary. . . .

3d. Here is not guilty found as to the point of neglect on which the later part of the declaration is as a special action upon the Case; but it's left on the common custom, as Carrier, etc. *Sed adjournatur*.

Tuesday, Jan. 28. *Wallop*, for the Plaintiff. At the common law on the general bailment it's against the defendant. 2. As a public carrier. And 3. as a master of a ship. As to the first is inferred that *de custodia tenetur* strictly (4 Co. 83, *Southeot's Case*; 1 Inst. 89); and the like of a simple *depositorius* (in Inst., lib. 3, cap. ; so *Bract.* 99, and *Grotius*, lib. 2, cap. 10, § 13, *de Jure Belli*) whose office is merely gratuitous.

2d. As of public profession, as he hath privilege so he hath trust and obligation, which is the reason the Civil Law hold them strictlier to it (*Pecchius*, 36), as an innkeeper (*Carpones Nautae et Tabularii*; *Hob.* 18; *Cro. Jac.* 330, *Rich v. Kneeland*). And that the defendant is but a servant doth not appear by his receiving salary. For

3d. he is master of a ship, and a judicial officer of universal note (*Loccenius*, lib. 2, cap.); he hath care of the whole ship, and by

the Laws of Oleron may pawn the ship (as Hob. 2, Bridgman's Case), which is more than an ordinary servant. Also he transacts all without notice of the owners, especially where there is no charter-party as here (Pecchius, 126); *ad magistrum respiciunt contrahentes*. That against the owners is *durum actio*, not *ex contractu unius* (see Pecchius, 132); the owners are but as fidejussors, and the master is the principal (*Lex Mercatoria*, 14, and Wellwood, 87, *Abridgment of Sea Laws*). He hath his office by public law, not by a private command (2 Hen.V. cap. 6). A sworn officer, and may impose pecuniary or corporal punishments on mariners, as steward of a manor; the master acts *officii praecepto*, a procurator, but as delegate the merchant may charge the owners or (1 Inst. 385) the master at election or the owners on insufficiency of the master. *Quoad habitum et proprietatem* the ship belongs to owners, but *quoad exercitium* it belongs to the master, as cure is divided between parson and vicar; and the salary is but as a fee of an officer (2 Inst. 463), though (1 Inst. 233) removable at will. 2. By the law of merchants the defendant ought to be charged. The 51 Rhodian Laws in Morison do include *exercitores* as well as the master; them *actione exercitoria*, him *actione civili*. The master may by his neglect bind himself and the owner to the merchant, but not contrary. The second and third law of Oleron obliges the master to answer for neglects (Bronchurst *de reg. juris*, 58; 1 Cro. 353) of *crassa* or *lata culpa* or *de culpa levissima*, and the having the usual number is not *diligentia exactissima* (Bronch. 61).

Molloy, for the Defendant. Freight was by Cape Merchant generally, he that hired a dead vessel: there the owner ran no risk. 2. A Cape Merchant special, which is now usual to take in by tonnage. 3. There was an under-freighter, which is the case in question with bills of lading (Van Luen's Digest). And in both those cases the owners are answerable. 4. On Cotton, 63, there were exercitors that of themselves undertook. All the first and last sort are obsolete, but the second and third now used. And the master is chosen but as a servant for his skill, and is answerable for his neglects only; and if he be in no fault he is discharged. And the merchant shall not be in better condition against the master than the owners have for the ship's furniture (9 Edw. IV. 40; Lane, 68; 2 Cro. 266). Also the Statute 32 Hen. VIII. cap. 4, that gives the Admiral concurrent jurisdiction herein, shows the delivery special in this case, therefore called merchant adventurers, and the master cannot be presumed to keep the merchant's goods safer than his own (2 Bulst. 209; Keil. 77; Doctor & Student, 38). Also the master hath no benefit by this delivery (4 Co. 48; Dyer, 239); therefore he that hath the benefit shall answer, which is the owner's (18 Hen. VI. 25 in 4 Inst. 146; Digest. *de exercitoria actione*, L. 1, § 3; Registre, 100; Worrall and Bradshaw's Case, 9 Jac.¹). There is elec-

¹ Reported in Harvard MS. Reports, 9 Jac.; *ibid.* 2-22 Jac., as follows: "Between Worrall and Bradshaw it was held, that where goods are delivered to the servant of a carrier to carry them, etc., action of trover does not lie against the carrier, but special action on the case." — ED.

tion by the marine law on wilful neglect, not else ; also the ship is instead of the owners (1 Roll. 530) and therefore is answerable (2 Rich. III. 2 ; Stat. 54). Taking alters the property spoiled by alien (F. N. B. 114, Regist. 129). for which letters of mart are given. Also piracy (13 Jac. Bellingham's Case) though illegal shall not make the master answerable, but for *spoliatio in navi* he shall answer (as Grotius *Digest. de fumosis libellis* ; and by the Laws of Oleron, cap. 5 ; Clyrak's Coment. in French, in Lincoln's Inn Library ; Tr. 24 Ed. III. tit. Bristol, no. 45, in Prunyn's Records). The master is not answerable for goods stolen out of the ship moored at anchor in pool where there is a sufficient number of men (Digest. 33 ; 1 Roll. 560, Ferns and Smyth), but only for his own faults.

2d. This is not like a common hoyman with small vessels [which] are common carriers and so accounted (27 Ed. III. cap. 15) ; but not ships (so Pasch. 13 Ed. IV. 19, and 1 Roll. 536). There is the like difference, Hill. 19 Car. II. in Exchequer in *Quo Warranto* against the City of London for water bailage ; it was resolved the duty was not due of great ships that come from foreign parts, but only of smaller vessels. And these have remedy against the county as other travellers (22 Ass. ; Davis, in the case of the Bank) ; but not the others, being (4 Inst. 147) floating castles, and none can enter into them for their safety, nor can the hundred take notice of their robbery (7 Co. 7, Sandal's Case) nor assist with naval provisions. And this will discourage navigation ; and is without precedent or practice, but the master always discharged.

The Court [per HALE, C. J.] agreed the master shall not answer for inevitable damage, nor the owners neither without special undertaking : when it's *vis cui resisti non potest*. But for robbery the usual number to guide the ship must be increased as the charge increaseth. And the master is not a mere servant ; for freight is the mother of wages, and one lost with the other, therefore this is money paid by the merchant.

And the Court inclined strongly for the plaintiff.

Saturday, Feb. 8.

Per totam Curiam. By the civil law and *lex mercatoria*, the master is liable so long as he is within the King's protection : And by our law, being within the body of the county, wages beginning here. And when he took in the goods he might have cautioned against them, not to take them in till farther time : as carrier that is not told what is in a box taken in, is liable for money, etc., unless he cautions against money. Also this differs not from a hoyman. For the master is an officer and not an ordinary servant, but as a gaoler who is chargeable for escapes, though *respondeat superior* for his default ; but a turnkey is but a servant, not liable. Also the owner receives freight in respect of this care, and whether he receives it from them or the merchant is not material. Also though the guard be sufficient for the ship, yet (33 Hen. VI. 1) he must have sufficient guard for the goods ; nor is this excuse of the carrier unless in case of common enemies.

Judgment for the Plaintiff.

COGGS v. BERNARD.

QUEEN'S BENCH, 1703.

[2 *Lord Raymond*, 909.]

IN an action upon the case the plaintiff declared, quod cum Bernard the defendant, the 10th of November, 13 Will. 3, at, &c., assumpsisset, salvo et secure elevare, *Anglice* to take up, several hogsheads of brandy then in a certain cellar in D., et salvo et secure deponere, *Anglice* to lay them down again, in a certain other cellar in Water Lane, the said defendant and his servants and agents tam negligenter et improvide put them down again into the said other cellar, quod per defectum curæ ipsius the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz. so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

GOULD, Justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man that undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage; and if a premium be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 H. 6, 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129 upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud. *ubi supra*, Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable without a gross neglect. So is Keilw. 160, 2 H. 7, 11, 22 Ass. 41, 1 R. 10. Bro. Action sur le case, 78. Southcote's Case is a hard case indeed, to oblige all men, that take goods to keep, to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two judges only, viz. GAWDY and CLENCH. But in 1 Vent.

121 there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for £30, the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

Powys agreed upon the neglect.

POWELL. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular neglect shown. And I hold an action will lie, as this case is. And in order to make it out, I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider Southcote's Case.

1. Those authorities in the Register, 110, a, b, of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs which are framed short. But a writ upon the case must mention everything that is material in the case, and nothing is to be added to it in the count but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, e., where there is a declaration so general. The year books are full in this point. 43 Ed. 3, 33, a., there is no particular act showed. There, indeed, the weight is laid more upon the neglect than the contract. But in 48 Ed. 3, 6, and 19 H. 6, 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 H. 7, 11, 7 H. 4, 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now, to give the reason of these cases, the gist of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So is it 1 Jones, 179, Palm. 548. For the bailee is not bound upon any undertaking against the act of God. Justice JONES in that case puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case, for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have

a remedy against the wrong doers ; as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them ; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action, indeed, will not lie for not doing the thing, for want of a sufficient consideration ; but yet if the bailee will take the goods into his custody, he shall be answerable for them ; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore, when I have reposed a trust in you, upon your undertaking, if I suffer when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's Case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. 4, 40, b, there is such an opinion by DEXBY. The case in 3 H. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. 7, 12, there is such an opinion, by the by. And this is all the foundation of Southcote's Case. But there are cases there cited which are stronger against it, as 10 H. 7, 26, 29 Ass. 28, the case of a pawn. My lord Coke would distinguish the case of a pawn from a bailment, because the pawnee has a special property in the pawn ; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Ed. 2, Fitzh. Detinue, 59, the case of goods bailed to a man, locked up in a chest, and stolen ; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these

reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

HOLT, Chief Justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in Southcote's Case. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadum*, and in English a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault

in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me, where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my lord Coke has improved the case in his report of it, for he will have it that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show that there never was any such resolution given before Southcote's Case. The 29 Ass. 28 is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable if the goods are stole. As for 8 Edw. 2, Fitz. Detinue, 59, where goods were locked in a chest and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case, they say, differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40, b, was but a debate at bar. For DANBY was but a counsel then, though he had been Chief Justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Gemey* for his client said the contrary. The case in 3 Hen. 7, 4, is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice PEMBERTON's time, and ever since, against the opinion of that case. When I read Southcote's Case heretofore, I was not so discerning as my brother POWYS tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered

and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, b, J. S., *apud quem res depōnitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentia, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.* As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentia, non tenetur.* Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet. So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong doers. 3 Cro. 214, *acc.* 2 Cro. 425, *acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong doers, when put in writing, it is hard it should do more so when spoken. Doct. & Stud. 130 is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's Case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz. *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should

lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, *ubi supra*; his words are, *Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuum accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet. si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur.* I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b. *Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.* From whence it appears that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz. *vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a

securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow. 123*. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. As to the second point, *Bracton, 99, b*, gives you the answer. *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere*. In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is *29 Ass. 28*, and *Southcote's Case* is. But indeed the reason given in *Southcote's Case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of *Assize*, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care or restoring the goods. But indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged *26 Car. 2*, in the case of *Mors v. Slew*. *Raym. 220. 1 Vent. 190, 238*. The law charges this person, thus intrusted to carry goods,

against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then, the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3, tit. 27, 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis*. I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7, 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskillfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A., and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21 Jac. 1, in the king's bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted

with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession. The declaration in the case of *Mors v. Slew* was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.¹

DALE v. HALL.

KING'S BENCH, 1750.

[1 *Wilson*, 281.]

ACTION upon the case against a shipmaster or keelman who carries goods for hire from port to port; the plaintiff does not declare against him as a common carrier upon the custom of the realm, but the declaration is that the defendant at the special instance of the plaintiff undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money, that the goods were delivered to the defendant on board his keel, and that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage.

For the defendant it was insisted at the trial, that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in, that they pumped and did all they could to prevent the goods being damaged; which evidence the Judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

Defendant argued that the breach assigned being that by the negli-

¹ See *Jones, Bailments*, 104 [1781]. "A carrier is regularly answerable for neglect, but not regularly for damage occasioned by the attacks of ruffians, any more than for hostile violence or unavoidable misfortune; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacies should be formed between carriers and desperate villains, with little or no chance of detection. Although the Act of God, which the ancients too called *θεοῦ βίαι* and *Vim divinam*, be an expression which long habit has rendered familiar to us, yet perhaps on that very account it might be more proper, as well as more decent, to substitute in its place inevitable accident. . . . Law, which is merely a practical science, cannot use terms too popular and perspicuous."—ED.

gence of the defaulter the goods were spoiled, therefore negligence is the very gist of this action, and the defendant has proved there was no negligence.

LEE, C. J. The declaration is, that the defendant undertook for hire to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says. Everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, unless they happen to be damaged by the act of God, or the king's enemies; and a promise to carry safely is a promise to keep safely.

WRIGHT, J., of the same opinion.

DENISON, J. The law is very clear in this case for the plaintiff; the declaration upon the custom of the realm is the same in effect with the present declaration. . . .

FOSTER, J., of the same opinion; and a new trial was granted.¹

FORWARD *v.* PITTARD.

KING'S BENCH, 1785.

[1 *Term Reports*, 27.]

THIS was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. This action was tried at the last summer assizes at Dorchester, before Mr. Baron Peryn, when the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case: —

“That the defendant was a common carrier from London to Shaftsbury. That on Thursday the 14th of October, 1784, the plaintiff delivered to him on Weyhill 12 pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftsbury by his public road waggon, which travels from London through Andover to Shaftsbury. That by the course of travelling, such waggon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning.”

N. Bond, for the plaintiff. The question is, whether a carrier is

¹ Of this case Sir William Jones says (*Bailments*, p. 105): “The true reason of this decision is not mentioned by the reporter: it was in fact at least ordinary negligence to let a rat do such mischief in the vessel; and the Roman law has on this principle decided that ‘*si fullo vestimenta polienda acceperit eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere.*’” — ED.

liable for the loss of goods occasioned by fire, without any negligence in him or his servants. The general proposition is, that a carrier is liable in all cases, except the loss be occasioned by the act of God, or the King's enemies. (Lord Raymond, 909. 1 Wils. 281.) And this doctrine has lately been recognized by this Court, in the case of the *Company of the Trent Navigation v. Wood*. (East. 25 Geo. 3. B. R.) The only doubt is on the construction of the words, "the act of God." It is an effect immediately produced without the interposition of any human cause. In *Amies and Stephens* (1 Stra. 128) these words were held to include the case of a ship being lost by tempest. In the books, under the head of "waste," there is an analogous distinction to be found: if a house fall down by tempest, or be burned by lightning, it is no waste; but burning by negligence or mischance is waste. (Co. Litt. 53. a. b.) Before the 6th of Anne (6 Ann. c. 31; 10 Ann. c. 14) an action lay against any person in whose house a fire accidentally began: this shows that an accidental fire was not in law considered as the act of God; but the person was punishable for negligence. Suppose a fire happens in a house where there are different lodgers, each of whose lodgings is considered as a separate house: if the fire be communicated from one lodging to another, and the Court say the first fire was the act of man, at what time will it be said that it ceases to be the act of man and commences to be the act of God? if it were not the act of man in the first house, it is impossible to draw the line. In the case of the *Company of the Trent Navigation and Wood*, Lord MANSFIELD said, "By the act of God is meant a natural, not merely an inevitable, accident."

If it be contended for the defendant that it is here stated that there was no actual negligence, that will not serve him: for this action was not founded in negligence. Lord HOLT says, there are several species of bailments, and different degrees of liability annexed to each: and a carrier is that kind of bailee, who is answerable though there be no actual negligence.

Borough, for the defendant, observed that the point in this case was not before the Court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him, that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to carriers. And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight can prevent; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. *Rich v. Kneeland*, Cro. Jac. 330. Hob. 17. 5 Burr. 2827.

In Vid. 27. The declaration, in an action against a waterman for

negligently keeping his goods, states the custom relative to carriers thus, “*absque subtractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium portatorum seu servientium suorum, hujusmodi bona et catalla eis sic ut prefertur deliberata, non sint perditā, amissa, seu spoliata.*” It then states the breach, that the defendant had not delivered them, and “*pro defectu bonæ custodiæ ipsius defendentis et servientium suorum perditā et amissa fuerunt.*” In *Brownl. Red.* 12. the breach in a declaration against a carrier is, “*defendens tam negligenter et improvidè custodivit et carriavit,*” etc. In *Clift.* 38, 39. *Mod. Intr.* 91, 92. and *Herne* 76. the entries are to the same effect. In *Rich and Kneeland* (*Hob.* 17), the custom is stated in a similar way: and in the Exchequer Chamber it was resolved, “that though it was laid as a custom of the realm, yet indeed it is common law.” On considering these cases, it is not true that “the act of God, and of the King’s enemies,” is an exception from the law. For an exception is always of something comprehended within the rule, and therefore excepted out of it: but the act of God and of the King’s enemies is not within the law as laid down in the books cited.

All the authorities cited by the counsel for the plaintiff are founded on the dictum in *Coggs v. Bernard* (2 Lord Raymond, 909), where this doctrine was first laid down: but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say that cases falling within the reason of what are vulgarly called “acts of God,” should not also be good defences for a carrier. After saying (Lord Raymond, 918), “the law charges the persons, thus intrusted to carry goods, against all events, but the acts of God and of the enemies of the King,” he proceeds thus, “for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner, as would not be possible to be discovered.” As Lord Holt therefore states the responsibility of carriers in case of robbery to take its origin from a ground of policy, he could not mean to say that a carrier was also liable in cases of accidents, where neither combination or negligence can possibly exist.

It appears from the *Doctor and Student* (*Dial.* 2. c. 38. p. 270) that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. And what is there said agrees precisely with the custom; and does not bear hard on the carrier. If he will travel by night, and is robbed, he has no remedy against the hundred; for then he is not protected by the statute of Winton, and he ought to be answerable to the employer. If he travel by day and is robbed he has a remedy. Now the carrier may not perhaps be worth suing; and the employer may bring the action against

the hundred in his own name ; which action he would be deprived of, if the carrier travelled by night.

There is not a single authority in all the old books which says that a carrier is responsible for mere accidents. He only engages against subtraction, spoil, and loss, occasioned by the neglect of himself or his servants. These words plainly point at acts to be done, and omission of care and diligence. But in the present case there is no act done ; and there cannot be said to be any omission of care and diligence, since they could not have prevented the calamity.

Lord Holt, in *Coggs v. Bernard*, seems to have traced, with great attention, the different species of bailments. He cites many passages from Bracton, who has nearly copied them from Justinian. So that it is probable that the custom relating to carriers took its origin from the civil law as to bailments. Now it is observable that in no one case of bailment is the bailee answerable for an accident : he is only liable for want of diligence. The only difference in this respect between the civil and the English law is, that the former (*Justin. lib. 3. 15. S. 2, 3. 4. Tit. 35. S. 5*) distinguishes between the different degrees of diligence required in the different species of bailment ; which the latter does not.

In all the cases to be found in our books, may be traced the true ground of liability, negligence. If the law were not as is now contended for, the question of negligence could never have arisen ; and the case of robbery could not have borne any argument ; whereas the case of *Mors v. Slue* (1 Vent. 190. 238) came on repeatedly before the Court, and created very considerable doubts.

In the case of *Dale v. Hall* (1 Wils. 281), and the proprietors of the *Trent Navigation v. Wood*, there were clear facts of negligence. In the first, the rats gnawed a hole in the hoy, which undoubtedly might have been prevented. And in the other, each of the judges, in giving his opinion, said there was negligence.

In the year books (22 Ass. 41) there is a case of an action against a waterman for overloading his boat so that the plaintiff's horse was drowned. This case is recognized in *Williams v. Lloyd* (W. Jones. 180), where it is said "it was there agreed that if he had not surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit : but if he surcharge the boat, otherwise ; for there is default and negligence in the party." The Court in 22 Ass. 41, said, "it seems that you trespassed when you surcharged the boat, by which the horse perished." The same case is to be found in 1 Ro. Abr. 10. pl. 18. Bro. Tit. Action sur le Case, 78. And it is also recognized in *Williams v. Hide and Ux.* Palm. 548.

In Winch. 26. To an action against a carrier, there is a special plea that the inn in which the goods were deposited was burned by fire, and that the plaintiff's goods were at the same time destroyed, without the default or neglect of the defendant or his servants. To this the plaintiff demurred, not generally but specially, "that the plea amounted to the general issue."

In all actions founded in negligence, the negligence is alleged and tried, as a fact; as in actions against a farrier, smith, coachman, etc. It is the constant course in such actions to leave the question of negligence to the jury. It appears in *Dalston v. Janson* (5 Mod. 90) that the defendant formerly used to plead particularly to the neglect. In 43 Edw. 3. 33. Clerk's Assist. 99. Mod. Intr. 95. and Brown. Red. 101. which were actions founded in negligence, the negligence is traversed. Now a traverse can be only of matter of fact. And here negligence is expressly negated by the case.

However, if the Court should be of opinion that the carrier is answerable for every loss, unless occasioned by the act of God, or the King's enemies, he then contended that, as the act of God was a good ground of defence, this accident though not within the words, was within the reason, of that ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, etc., are the immediate acts of the Almighty, they are permitted but not directed by him. The reason why these accidents are not held to charge a carrier is that they are not under the control of the contracting party; and therefore cannot affect the contract, inasmuch as he engages only against those events which by possibility he may prevent. Lord Bacon, in his Law Tracts, commenting on this maxim, Reg. 5. "*necessitas inducit privilegium quoad jura privata*," says, "the law charges no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself." Necessity, he says, is of three sorts; and under the third he adds, "If a fire be taken in a street, I may justify pulling down the walls or house of another man to save the row from the spreading of the fire." Now in the present case, if any person, in order to stop the progress of the flames, had insisted on pulling down the booth wherein the hops were deposited, and in doing this the hops had been damaged, the carrier would not have been liable to make good such damage; for it would have been unlawful for him to have prevented the pulling down the booth.

It is expressly found in the present case that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course it would take was as little to be discovered by human penetration.

Bond, in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence; for every thing is negligence which the law does not excuse (1 Wils. 282). And the question here is, is this a case which the law does excuse? In *Goffe v. Clinkard* (cited in Wils. 282.) there was all possible care on the part of the defendants. The judgment in the case of (4 Burr. 2298) *Gibbon v. Peyton* and another, which was an action against a stage-coachman for not delivering money sent, is extremely strong; there Lord MANSFIELD said (4 Burr. 2300), "a common

carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery."

That a carrier was liable in the case of a robbery was first held in 9 Ed. 4. pl. 40.

A bailee only engages to take care of his goods as his own, and is not answerable for a robbery; but a carrier insures. 1 Ventr. 190, 238. Sir T. Raym. 220. S. C. 1 Mod. 85.

In *Barelay and Heygena* (E. 24 G. 3. B. R.), which was an action against a master of a ship to recover the value of some goods put on board his ship in order to be carried to St. Sebastian; it was proved that an irresistible force broke into the ship in the river Thames, and stole the goods; yet the defendant was held answerable. In *Sutton and Mitchel* (at the sittings at Guildhall after Tr. 25 G. 3. *Idle* 1 T. R. 18), the question was not disputed as far as to the value of the ship and freight.

There is no distinction between that case and a land carrier. And there can be no hardship in the Court's determining in favour of the plaintiff; for when the law is once known and established, the parties may contract according to the terms which it prescribes.

As to negligence being a matter of fact; that is answered by the decision in the *Company of the Trent Navigation* against Wood.

LORD MANSFIELD. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action. Cur. adv. vult.

Afterwards LORD MANSFIELD delivered the unanimous opinion of the Court.

After stating the case—The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true

reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.

CHAPTER I.

BAILMENT AND UNDERTAKING.

SHIELLS v. BLACKBURNE.

COURT OF COMMON PLEAS, 1789.

[1 *H. Bl.* 159.]

THE material facts of this case were as follows: The defendant, who was a general merchant in London, having received orders from his correspondent in Madeira, to send thither a quantity of leather cut out for shoes and boots, employed Goodwin the bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather on his own account, which he packed in a separate case, to be sent to Madeira on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels; and he, in order to save the expense and trouble of a separate entry at the custom-house, voluntarily and without any compensation, by agreement with Goodwin, made one entry of both the cases, but did it under the denomination of wrought leather, instead of dressed leather, which it ought to have been. In consequence of this mistake in the entry, the two cases were seized, and this action was brought by the assignees of Goodwin, to recover the value of the leather which he had prepared to export on his own account. The declaration stated, that the bankrupt before his bankruptcy was possessed of a quantity of leather, which he designed to export to the island of Madeira, for which purpose it was necessary that a proper entry of it should be made at the custom-house; that the defendant, in consideration that the bankrupt would permit him to enter the said leather at the custom-house, undertook to enter it under a right denomination; that the bankrupt confiding in the undertaking of the defendant, did permit him to enter it at the custom-house for exportation: that the defendant did not enter it under a right denomination, but on the contrary, made an entry of it under a wrong denomination, of wrought leather, in order improperly to obtain a bounty (by Stat. 12 Anne, Stat. 2, c. 9, s. 64, a drawback is allowed of three halfpence on every pound weight of leather exported, which shall be manufactured, and actually made into goods

and wares. Made perpetual by 3 Geo. I. c. 7) thereon; by means of which wrong entry the leather became liable to be seized, and was seized and forfeited to the king. 2d. Count goods sold and delivered. 3d. *Quantum meruit*. Plea, general issue, verdict for the plaintiff.

A rule was obtained to show cause why the verdict should not be set aside, and a new trial granted, on the grounds that the defendant not professing the business of entering goods at the custom-house, having undertaken to enter those in question without reward, and having the same care of them as of his own, was not liable for the loss.

HEATH, J. The defendant in this case was not guilty either of gross negligence or fraud; he acted *bona fide*. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action.

WILSON, J. Where money has been paid for the performance of certain acts, the person receiving it, is by law answerable for any degree of neglect on his part; the payment of money being a sort of insurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is gratuitous, and the party has acted *bona fide*, it is not consistent either with the spirit or policy of the law, to make him liable to an action. Here Goodwin wanted to dispose of his goods, which the defendant entered together with his own, without any reward. Could he be understood to be answerable for more care than he took of his own goods? There was no suspicion of any fraudulent design. A wrong entry at the custom-house cannot be considered as gross negligence, when, from the variety of laws relating to the customs, reliance must be placed on the clerks in the offices. It happened, indeed, not long since, that a man, designing to export wool under the late act 28 Geo. III. c. 38, applied to a clerk in the custom-house to make a proper entry of it, who, not understanding the act of parliament, entered it wrong, and the goods were seized: when, therefore, such cases happen, it is too much to infer gross negligence from the mistake which the defendant committed.

LORD LOUGHBOROUGH. I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in

this case a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence.

Rule absolute for a new trial.

WILSON v. BRETT.

COURT OF EXCHEQUER, 1843.

[11 M. & W. 113.]

CASE. The declaration stated, that the plaintiff, at the request of the defendant, caused to be delivered to the defendant a certain horse of the plaintiff of great value, to wit, &c., to be by the defendant shown to a certain person to the plaintiff unknown, and to be re-delivered by the defendant to the plaintiff on request, and that thereupon it then became and was the duty of the defendant to take due and proper care of the said horse, and to use and ride the same in a careful, moderate, and reasonable manner, and in places fit and proper for that purpose; yet the defendant, not regarding his duty, &c., did not nor would take due and proper care of the said horse, but on the contrary used and rode the same in a careless, immoderate, and improper manner, and in unfit and improper places, &c., whereby the said horse was injured, &c. Plea, not guilty.

At the trial before ROLFE, B., at the London Sittings in this term, it appeared that the plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others playing the game of cricket; and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. The learned Judge, in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that, if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff. The jury found for the plaintiff, damages £5. 10s.

Byles, Serjt., now moved for a new trial, on the ground of misdirection. There was no evidence here that the horse was ridden in an unreasonable or improper manner, except as to the place where he was ridden. The defendant was admitted to be a mere gratuitous bailee; and there being no evidence of gross or culpable negligence, the learned Judge misdirected the jury, in stating to them that there was no difference between his responsibility and that of a borrower. There are three classes of bailments: the first, where the bailment is altogether for the benefit of the bailor, as where goods are delivered for deposit or carriage; the second, where it is altogether for the benefit of the bailee, as in the case of a borrower; and the third, where it is partly for the benefit of each, as in the case of a hiring or pledging. This defendant was not within the rule of law applicable to the second of these classes. The law presumes that a person who hires or borrows a chattel is possessed of competent skill in the management of it, and holds him liable accordingly. The learned Judge should therefore have explained to the jury, that that which would amount to proof of negligence in a borrower, would not be sufficient to charge the defendant, and that he could be liable only for gross or culpable negligence.

LORD ABINGER, C. B. We must take the summing up altogether; and all that it amounts to is, that the defendant was bound to use such skill in the management of the horse as he really possessed. Whether he did so or not was, as it appears to me, the proper question for the jury. I think, therefore, that the direction was perfectly right, and that no rule ought to be granted.

PARKE, B. I think the case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it.

ALDERSON, B. The learned Judge thought, and correctly, that, this defendant being shown to be a person of competent skill, there was no difference between his case and that of a borrower; because the only difference is, that there the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it.

ROLFE, B. The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill.

If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence* — that it was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence.

Rule refused.

GILL v. MIDDLETON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1870.

[105 Mass. 477.]

AMES, J. In the ordinary contract between landlord and tenant, there is no implied warranty on the part of the former that the demised premises are in tenable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract; and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But although a gratuitous executory contract of that kind would not be binding upon him, he would place himself in a very different position if he should see fit to treat it as binding, and actually enter upon its fulfilment. He is at liberty to repudiate or to perform it, at his option; but if his choice should be to perform it, he comes under some degree of liability as to the manner of its performance. It is well settled, that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise. *Benden v. Manning*, 2 N. H. 289; *Thorne v. Deas*, 4 Johns. 84; *Elsee v. Gatward*, 5 T. R. 143; *Shiells v. Blackburne*, 1 H. Bl. 158; *Balfe v. West*, 22 Eng. Law & Eq. 506.

In this case, the landlord was told that the building was in an unsafe condition; and what he undertook to do, at the request of his tenant, was to make it safe. He not only assumed to do the work, but he notified the tenant when it was done, and invited him to make use of the building, assuring him that it was perfectly safe. Under these circumstances, it was correctly ruled by the presiding judge, that if on trial it proved to be unsafe, by reason of the want of ordinary care and skill on the part of the defendant in the workmanship or in the selection of the materials used, he might be held responsible in damages.

It is argued, that upon a gratuitous undertaking of this nature the defendant could only be held responsible for bad faith or for gross negligence, and that it was therefore an error to instruct the jury that he was liable for want of ordinary care and skill. But in assuming to

make the repairs at the request of the tenant he must be considered as professing to have the requisite skill as a mechanic, and as undertaking to select and furnish the kind and quality of materials appropriate to the accomplishment of the desired object. It appears to us that this is one of the cases in which there is no practical difference between gross negligence and the want of ordinary care and skill; and that the omission of what Baron Rolfe calls a mere vituperative epithet is not a valid objection to the judge's charge. The true question for the jury was, whether the defendant had discharged the duty which he had assumed, with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances. His undertaking required at least the skill of an ordinary mechanic, and his failure to furnish it, either because he did not possess or neglected to use it, would be gross negligence. *Steamboat New World v. King*, 16 How. 469. The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility. The question of reasonable care must always depend on the special circumstances of each case, and is almost of necessity a question of fact rather than of law. The degrees of negligence, so often spoken of in the text-books, do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate. *Steamboat New World v. King*, 16 How. 469; *Chandler v. Worcester Insurance Co.*, 3 Cush. 228; *Wilson v. Brett*, 11 M. & W. 113; *Grill v. General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600. The jury under proper instructions have found the defendant guilty of culpable negligence, and accordingly the

Exceptions are overruled.

PIERCE v. SCHENCK.

SUPREME COURT OF NEW YORK, 1842.

[3 *Hill*, 28.]

COWEN, J. This was an action of trover for logs furnished by the plaintiff to the defendant, and delivered at or near his mill, to be, by a time fixed, manufactured into boards on shares, each to have one half. The defendant manufactured some of the more indifferent logs only; and converted the whole to his own use. I speak of what the jury must be taken to have found under the form in which the questions of fact were submitted to them by the judge. As to damages, he charged that, if the defendant had failed to fulfil the contract on his part, he was liable for the whole, without any deduction on account of the half of what he had actually sawed.

The questions are, first, whether trover was properly brought; and secondly, whether, if it were, the direction was right in respect to the amount of damages.

Had the contract by the parties been one of sale, as, if the defendant had taken the logs, under a promise to return boards generally, of equal value to one half of the boards to be made out of them, the decision of the judge would have been erroneous. *Smith v. Clark*, 21 Wend. 83-85, and the cases there cited. But this was not the case. The plaintiff delivered his logs to the defendant, who was a miller, to be manufactured into boards—a specific purpose, from which he had no right to depart. On completing the manufacture he was to return the specific boards, deducting one half as a compensation for his labor. It is like the case of sending grain to a mill for the purpose of being ground, allowing the miller to take such a share of it for toll. This is not a contract of sale, but of bailment—*locatio operis faciendi*. The bailor retains his general property in the whole till the manufacture is completed; and in the whole afterwards, minus the toll. The share to be allowed is but a compensation for the labor of the manufacturer, whether it be one tenth or one half. Thus, in *Collins v. Forbes*, 3 T. R. 316, it appeared that Forbes furnished certain timber to one Kent, which the latter was to work up into a stage for the commissioners of the victualling office, he to receive one fourth of the clear profit and a guinea per week, on the work being done. This was holden to be a bailment by Forbes. So, in *Barker v. Roberts*, 8 Greenl. 101, A agreed to take B's logs, saw them into boards and return them to B, who was to sell them and allow to A all they brought beyond so much. This was held to be a bailment, and not a sale, though it was expressly agreed that the logs should remain all the while at A's risk. A having sold the logs instead of sawing them, B was allowed to recover their value against A's vendee. What difference is there in principle between an agreement by the owner to pay a share of the avails in money, and in a part of the specific thing? Either is but a compensation for his labor. Nearly all the books concede the distinction laid down in Jones on Bailm. 102, between an obligation to restore the specific thing, and a power or necessity of returning others equal in value. In the first case, it is a regular bailment. In the second, it becomes a debt. Story on Bailm. § 439; *Bnffum v. Merry*, 3 Mason, 478; *Holbrook v. Armstrong*, 3 Fairf. 31-34; *Dearborn v. Turner*, 4 Shepl. 17; *Ewing v. French*, 1 Blackf. 353, 355, and note (2); *Hurd v. West*, 7 Cowen. 752-756, and note (a); *Smith v. Clark*, 21 Wend. 84, 85. I have been unable to see any difference in the nature of the contract, whether there be an obligation to restore the whole, or only a part of the specific thing. The owner of goods may reserve the general ownership in the whole or in any part, as he pleases; and he can with no more propriety be said, *pro tanto* at least, to have parted with it in the latter case, than in the former.

Was it correct to tell the jury that, unless the defendant had performed his contract, no right vested in him to take any part of the boards, even a share of those which he had actually sawed? I think it was. I am of opinion that when a manufacturer receives goods for the

purpose of being wrought in the course of his trade, the contract is entire; and without a stipulation to the contrary, he has no right to demand payment until the work is complete. *A fortiori* he has no right to carve out payment for himself, without consulting the bailor. A miller is entitled to take toll from your grist, on grinding it; but he chooses to grind only a part, and then sell the whole. He is not entitled to his toll for what he actually ground. It is like the common case of a man undertaking to labor during a certain time, or in finishing a certain amount of work, for so much. Till the labor be performed, he can claim nothing. It may be conceded that, had the logs in question been sawed as agreed, a tenancy in common would have arisen, and the plaintiff's damages been thus limited to the value of one half the boards. Not having been so sawed, no right vested in the defendant; at least, none which could work a change in the relation between the parties of bailor and bailee.

As I understand the judge, he directed the jury to allow damages upon this principle, should they think the case came within it. And I see nothing upon which I feel authorized to say that the verdict is not according to the weight of evidence.

NELSON, C. J., and BRONSON, J., said, the question whether the plaintiff could recover as damages the value of all the boards which were made from the logs sawed, seemed not to have been distinctly made on the trial. They agreed, that the plaintiff was entitled to recover the value of all the logs. *New trial denied.*

ATLANTIC COAST LINE RAILROAD CO. v. BAKER.

SUPREME COURT OF GEORGIA, 1903.

[118 Ga. 809.]

BAKER sued the railroad company, in a justice's court, for damages on account of the burning of certain cross-ties, alleged to be "the property of complainant." From the plaintiff's evidence at the trial it appeared that he had cut the ties under a verbal contract with Jones, on land of the Wilkins estate and from timber grown thereon, which Jones had leased for the purpose of cutting ties; that under the contract with the plaintiff, Jones was to pay him twelve cents "for each tie he got out, after the ties had been inspected and delivered to" Jones; and that the ties which were burned had not been inspected and delivered, and, at the time of the burning, were on the leased premises. At the conclusion of the testimony introduced by the plaintiff, "counsel for the defendant moved to dismiss the suit . . . and to enter up judgment for the defendant, on the ground that the plaintiff had failed to prove that the cross-ties . . . were the property of the plaintiff, or to prove that he had such an interest in them as would entitle him to sue for their value." The motion was overruled, and, no

evidence being introduced for the defendant, the court rendered judgment for the plaintiff for the amount sued for. This judgment and the overruling of the motion to dismiss were complained of in the defendant's petition for certiorari. The certiorari was overruled, and the defendant excepted.

LAMAR, J. "A bailment is a delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee, or both; and upon a contract, express or implied, to carry out this object and dispose of the property in conformity with the purpose of the trust." Civil Code, § 2894. But delivery under which the bailee acquires an independent and temporarily exclusive possession is essential to the contract of bailment. When, therefore, the owner of timber contracted with another that the latter should convert the trees into ties, and agreed to pay therefor at a certain rate for each tie when inspected and delivered, the arrangement was not one of bailment. It gave the workman no special property in the ties. There was no exclusive possession in the bailee. The title and possession of the standing timber were in Jones; when a tree was cut and fell to the ground, and when the ties were hewn and piled on his land, the legal possession of Jones continued. The contract was one of employment, under which Baker was to do the work and receive compensation when the cross-ties were inspected. It is true the witness stated that payment was to be made when they were inspected and delivered, but in legal effect they needed no delivery, already being, in contemplation of the law, in the possession of the owner. It is like the case where one is employed to split rails, or to cut and cord wood on the premises of the owner. The workman may have physical custody and by his labor may have given added value to the material; but the legal possession is in the owner of the land, and the laborer has no special property therein as bailee. He may acquire a lien under the Civil Code, §§ 2792, 2793, but has none under those sections relating to bailments. *Fitzgerald v. Elliott*, 126 Pa. St. 118, 42 Am. St. R. 812, is directly in point. It is not like the case where wheat is left with a miller to be ground into flour, or where logs are turned over to the owner of a sawmill to be converted into boards. In these cases there is an actual change of legal as well as physical possession, by virtue of which the bailee is entitled to maintain an action of trover or trespass against one who interferes with his possession, or who negligently destroys the property while in his custody. The title and possession of the ties being in Jones, the right of action for their destruction was in him, and the plaintiff must look to his employer for compensation for the work done, or for the value of his services. Compare Civil Code, § 2919; *Wall v. State*, 75 Ga. 474; *Thornton v. McDonald*, 108 Ga. 3; *Jordan v. Jones*, 110 Ga. 47. This conclusion necessitating a reversal, it is unnecessary to consider whether under the facts the defendant was shown to have been liable for the results of the fire.

Judgment reversed. All the justices concur

TULANE HOTEL CO. *v.* HOLOHAN.

SUPREME COURT OF TENNESSEE, 1903.

[112 *Tenn.* 214.]

WILKES, J. The facts in this case are undisputed, and are, in substance, as follows :

Mr. Holohan, a travelling salesman, came to Nashville on the morning of September 1, 1901. He brought with him two grips or suit cases. These grips were turned over at the depot to the porter of the Tulane Hotel, as Mr. Holohan intended to stop at that hotel. However, he did not stop at the Tulane Hotel, but, after breakfasting at the Terminal Station Hotel, he met a friend of his, and went home with him, and did not stop or stay at the Tulane as its guest while on this trip.

Mr. Holohan, however, went to the Tulane on the afternoon of his arrival to secure his grips, but only one of them could be found. Several demands were made on the hotel for the missing grip, but it was not produced, and upon the refusal of the hotel company to pay for it this suit was brought.

Mr. Holohan did not register at the hotel on either September 1 or 2, 1901, did not procure any accommodations there on either of those dates, and was not a guest of the Tulane Hotel while on this visit to the city. The case was tried without a jury, and resulted in judgment for plaintiff for \$79.25 and costs, and the hotel company has appealed and assigned errors.

It is assigned as error that there is no evidence to support the finding of the circuit judge, for two reasons :

First. There is no evidence to show that Mr. Holohan was a guest of the hotel, and, unless he is shown to have been a guest, the hotel is not liable, as an innkeeper, for the care of his baggage.

Second. There is no evidence to show that the baggage was lost by the negligence of the hotel company, and, unless gross negligence can be imputed to it, it is not liable as a gratuitous bailee.

In the first place, was Mr. Holohan a guest of the hotel?

We think not. The universal rule seems to be that one cannot become the guest of a hotel unless he procure some accommodation. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper, before he becomes a guest.

In the case at bar Mr. Holohan procured no accommodation from the hotel, nor did he offer to buy anything.

In the case of *Whitemore v. Haroldson*, 2 Lea, 312, it was held : " If one not a guest sends goods to an innkeeper without compensation to be made, he would not be subject to the liability of an innkeeper if the goods were lost, but only to such liability as attached to a gratuitous bailee ; that is, for loss or damage occasioned by gross negligence.

"The first requisite of the extraordinary liability now under consideration is that the relation of innkeeper and guest should have existed between the parties at the time the loss or injury occurred; and such liability cannot be imposed in any case where the relation never in fact existed. Under such circumstances, if the innkeeper is a gratuitous bailee, he is only liable in case loss occurs in consequence of gross negligence on his part."

16 Am. and Eng. Enc. Law, 530. See, also, 2 Parsons on Contracts, p. 165; Schenler on Bailments, sec. 280; Redfield on Carriers and Bailments, sec. 592.

Defendant company cannot, therefore, be held liable as an innkeeper.

It is said that it can be and should be held liable as a mere bailee. We do not think that the hotel company, under the facts in this case, ever had the custody or the possession of this baggage. It is true that it was delivered into the care and custody of the hotel porter at the station; but the porter had no authority to receive it, or charge the hotel company for its safe-keeping, unless the owner was a guest, or subsequently became one. The porter himself individually was the gratuitous bailee. If he deposited the grip in the hotel office — as it appears he did — still it was not placed in the possession or custody of the clerk or baggage keeper or any other employee of the hotel company, nor was their attention ever called to the same. So far as the hotel is concerned, it is the same as if the porter had gratuitously brought up the valise of a friend or a stranger and put it down in the hotel office, without calling any attention to it, or giving the hotel employees any notice of it, and no occasion existing for them to take charge of it.

If there is bailment in this case, the train porter is the bailee, and not the hotel company, who never, by any authorized agent, had any care or custody of the baggage, or any notice of it.

The judgment is reversed, and the suit dismissed, at the cost of appellee.

LEAVY v. KINSELLA.

SUPREME COURT OF ERRORS, CONNECTICUT, 1872.

[39 Conn. 50.]

TROVER for two pigs; appealed from the judgment of a justice of the peace to the Court of Common Pleas, and tried on the general issue, with notice, closed to the jury, before *Brewster, J.*

The plaintiff bought of the defendant on Tuesday, July 11th, 1871, the two pigs in question, and agreed to pay him therefor \$11 on delivery, and afterward, on the same day, the plaintiff and his wife selected and took away the two pigs, but not having the money then,

the plaintiff promised to pay for them that week, but did not then pay for them, nor has payment for them since been made to the defendant. On the next day the plaintiff, learning that he could buy pigs cheaper, so informed the defendant's wife, and that he should bring the two pigs back, and would not keep them any way, when she replied that he had bought them and must pay for them. Thereafter, on the same day, the plaintiff returned the pigs to the defendant's pen in his absence, and as soon as the defendant learned of this return he gave notice to the plaintiff that he must take them away, which the plaintiff refused to do or to pay for them. Thereupon the defendant sued the plaintiff in assumpsit on the common counts for goods sold and delivered, and on the 15th of August, 1871, recovered judgment against him for the price of the pigs and costs, which judgment has never been paid. On the 18th of August, 1871, the plaintiff, on learning of such decision and judgment, made a demand on the defendant's wife and on the defendant for the pigs, and both refused to give them up; the defendant claiming he had a right to their possession until the plaintiff had paid for them and their keeping, and thereupon this action of trover was brought.¹

SEYMOUR, J. . . . The parties differing as to the ownership of the pigs, the plaintiff insists that, pending the dispute, the defendant shall keep them, and he places the property in such condition that the defendant must keep them and feed them, or allow them to suffer. The plaintiff supposed he had a right to return the property, but it turns out he had no such right. The defendant was placed by the plaintiff's act in such a condition that he was compelled to care for and feed the plaintiff's animals. The defendant is made a bailee, with the duty of incurring expense, not by his own choice, but by compulsion. Upon these circumstances the plaintiff was liable upon an implied assumpsit to pay the expense of keeping. The keeping is by the plaintiff's request, clearly implied, if not express.

Now in general all bailees for hire have a lien on the thing bailed for the amount of their compensation, and common carriers and innkeepers have peculiar claims to their liens, because they cannot refuse to incur the expense cast upon them by their customers. And here the defendant may ground his right to a lien upon similar principles of justice and equity. The defendant cannot be regarded as a volunteer. All the circumstances show that he could not do otherwise than he did. It would have been of no use for him to attempt to return the pigs to the plaintiff, and he was under no obligation to incur the expense and hazard of such an attempt. It was urged by the plaintiff that the finder of goods has at common law no lien for expenses incurred by him upon the goods found, however needful and however beneficial to the owner, but that case is put by Chief Justice Eyre, in *Nicholson v. Chapman*, 2 H. Black. 254, upon the ground "that the finder voluntarily puts himself to the trouble and expense to preserve the thing

¹ Part of the statement of facts and of the opinion are omitted. — ED.

found, &c." The distinction between the case before us and that of a mere finder is obvious, and the denial of a lien to the finder rests upon reasoning which supports and confirms the lien of the defendant.

We therefore advise a new trial.

KRUMSKY v. LOESER.

SUPREME COURT OF NEW YORK, 1902.

[37 *Miscellaneous Rep.* 504.]

GREENBAUM, J. Defendants appeal from a judgment rendered against them in the Municipal Court, fifth district.

The facts upon which the controversy between the parties hinges are practically undisputed.

The plaintiff is a manufacturer of ladies' wrappers. The defendants are the proprietors of a large department store in Brooklyn. The parties had never had business relations with each other. On April 19, 1901, two swindlers purporting to represent the defendants ordered a bill of goods of the plaintiff, with directions to deliver them to the defendants' place of business. The plaintiff, after satisfying himself of the financial ability of defendants, as he asserts, sent the goods to the defendants by an expressman. It appears that the defendants' establishment is in the habit of receiving about 350 packages from various houses daily and that the goods were received under the assumption that they had been ordered by the defendants. Later in the day the man in charge of the receiving department of the defendants was called up on the telephone by a person who represented himself to be the plaintiff and who stated that the case of wrappers had been delivered to the defendants by mistake and that the goods would be called for. Shortly after this conversation a person called with an order, purporting to be signed by plaintiff, addressed to the defendants, requesting the redelivery of the case to bearer. The order explained that the mistake was occasioned by wrongly addressing the goods to the defendants instead of "E. Losier, Savannah, Ga.," and expressed the hope that the defendants had not been inconvenienced. The goods were thereupon handed over to the bearer of the order. It subsequently transpired that the plaintiff and the defendants were the victim of a swindle and the question is presented as to which of the parties must bear the loss of the goods.

The plaintiff attempts to fasten a liability upon the defendants as gratuitous bailees upon the theory of the defendants' negligence in accepting the goods and delivering them up to a stranger. Were defendants bailees? A bailment must be predicated upon some contractual relation, express or implied, upon the delivery of the goods, between the bailor and bailee. In this case the goods were by trick, the result of a fraud practised upon plaintiff, thrust upon the defendants, who thus

for a short time were, unconsciously and unknowingly, the custodians of the plaintiff's goods. Where one becomes possessed of another's goods by chance or accident, no bailment obligation will arise unless the possessor is aware and has knowledge of the fact that goods have come into his possession which belong to another. In the case at bar, the knowledge that the defendants became possessed of the goods not belonging to them was communicated to them by the swindler to enable him to carry out his scheme of obtaining the property of the plaintiff.

If I am apprised by another that a certain article belonging to him was sent to me by mistake, am I not justified in assuming, from the very fact of such party first making me aware of its possession, that he is the true owner and entitled to its return? Am I obligated or beholden to the real owner, if I have been deceived, to account for the value of the article thus secured from me through trick? I think not. If, however, by any process of reasoning the duty of a gratuitous bailee could be fastened upon the defendants, then I am of opinion that, inasmuch as they would only be chargeable in that case with gross negligence (*First Nat'l Bank v. Ocean Nat'l Bank*, 60 N. Y. 278), they should not be here held liable.

They were certainly no more negligent than was the plaintiff in parting with his goods. The defendants, indeed, acted in the matter as any ordinarily prudent man could have been expected to act under the circumstances.

Judgment reversed and a new trial ordered, with costs to appellants to abide the event.

FREEDMAN, P. J., and GIEGERICH, J., concur.

LINCOLN *v.* GAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1895.

[164 *Mass.* 537.]

CONTRACT to recover for injury to the plaintiff's dress pattern in making the same up on the wrong side of the cloth. The judge instructed the jury, among other things, as follows:

"The claim on the part of the plaintiff is that there was no express stipulation with reference to which side of this cloth should be made up. It is a question for us, then, what stipulation the law will imply under such circumstances.

"Perhaps I can simply illustrate it. If any one of us should take a piece of broadcloth to our tailor and ask him to make it into a coat, and he should undertake to do so and nothing more was said about it, the law would carry with the contract which we made the stipulation that he should make it into a coat, using due and proper care and skill and proper workmanship, and that would involve putting the cloth in right side out."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.¹

MORTON, J. If the dress was delivered to the defendant by the plaintiff without any instructions, the defendant, being a bailee for hire, was held to that degree of skill and care in the particular occupation in which she was engaged, which was that of a dressmaker, which would enable her to do the work intrusted to her in a reasonable and proper manner. *Jackson v. Adams*, 9 Mass. 484. Story, *Bailments*, § 431, and cases cited. Her understanding that it was a proper way to make the dress up wrong side out would be immaterial, therefore, if in the exercise of a proper degree of skill and care the dress ought not to have been made up in that way. *Exceptions overruled.*

UNITED STATES v. THOMAS.

SUPREME COURT OF THE UNITED STATES, 1872.

[15 *Wallace*, 337.]

ERROR to the Circuit Court for the Middle District of Tennessee.

The United States sued Thomas and others as the principal and sureties on the official bond of the said Thomas, as surveyor of the customs for the port of Nashville, Tennessee, and depository of public moneys at that place. The condition of the bond was in the usual form, that he should faithfully execute and discharge the duties of his office, according to law, and should well, truly, and faithfully keep safely, without loaning, using, depositing in banks, or exchanging for other funds than 'as allowed by act of Congress, all the public money collected by him or otherwise placed in his possession and custody, till the same should be ordered by the proper department, or officer, to be transferred or paid out; and when such orders for transfer or payment were received, should faithfully and promptly make the same as directed, and should perform all other duties as fiscal agent of the government which might be imposed by any act of Congress or regulation of the Treasury Department, &c. The breach alleged was, that certain public moneys were collected by Thomas in his official capacity, and were placed in his possession and custody, of which a balance of \$4,880 remained in his hands on the 27th of April, 1861, which he did not keep safely, but which he paid out to persons not entitled thereto, whereby it was wholly lost; and that although the said sum was ordered by the proper department and officer to be transferred and paid out, he failed and refused to transfer or pay it out, as so required. The defendants, besides performance, pleaded seizure of the moneys in question by the rebel authorities by the exercise of force,

¹ The statement of facts has been abridged, and only so much of the opinion as discusses this instruction is given.—Ed.

which Thomas was unable to resist, and against his will and consent, he being a loyal citizen, endeavoring faithfully to perform his duty. Upon the trial, evidence was adduced tending to support this plea, and the court charged the jury that if they believed from the evidence that, at the time the demand was made by the insurgents for the surrender by Thomas of the effects in his hands belonging to the government, there was an organized insurrection in the State of Tennessee, and in the city of Nashville, against the government of the United States, with a force sufficient to compel obedience to the orders and demands of the governor who led and controlled such insurrection, and that in this state of things the demand was made upon Thomas to surrender said effects; and if they further believed that Thomas was acting in good faith, and surrendered the effects in his hands only in the honest belief that he would be imprisoned and the effects seized by force, and had good reason to apprehend that and other violence to his person; and if they believed that the threatened force would be applied to compel the surrender, then the court was of opinion that the seizure and appropriation of the government effects in his hands would be by public enemies of the United States, and would relieve him from liability for the same, notwithstanding the condition of his bond; but if they believed that Thomas was one of the insurrectionists, or willingly co-operated with them in their lawless acts against the government, the jury might infer that he was willing that the effects in controversy should fall into the hands of the rebel authorities, and he would not be relieved from the obligations of his bond. To this ruling an exception was taken, and whether the ruling was correct in law was the point now before this court.

BRADLEY, J. This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal government agents, against their will, and without their fault or negligence, is, or is not, a sufficient discharge from the obligations of their official bonds. This precise question has not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will, and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required?

The question is thus stated in its double aspect, namely: first, in regard to the obligation arising from official duty; and, secondly, in regard to that arising from the bond, because the condition of the latter is twofold. — that the principal shall faithfully discharge his official duties, and that he shall pay the moneys of the government that may come into his hands as and when it shall be demanded of him. It is contended that the latter branch of the condition has a more stringent

effect than the former, and creates an obligation to pay, at all events, all public money received.

That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and aside from such a bond as exists in this case, seems almost self-evident. If it is not, then every military commander who ever lost a battle, or was obliged to surrender his ship or fort, or other public property, added a civil obligation to his military misfortune. And as it regards this question, it is difficult to perceive any distinction between the loss of one kind of property and another. If the property belongs to the government, the loss falls on the government; if it belongs to individuals, it falls on them.

The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation.

The ordinary rule will be found illustrated by a number of analogous cases.

It is laid down by Justice Story that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence. Story on Bailments, § 620. Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them. *Ib.*; Lewin on Trusts, 332, 3d ed. They are not liable for a loss by theft without their fault. *Ib.* But this exemption ceases when they mix the trust-money with their own, whereby it loses its identity, and they become mere debtors. *Ib.* and 2 Story's Equity Jurisprudence, § 1270, and see §§ 1268, 1269; also 2 Spence's Equity Jurisprudence, 917, 921, 933, 937; *Wren v. Kirton*, 11 Vesey, 381; *Utica Insurance Co. v. Lynch*, 11 Paige, 520. Receivers, appointed by the court, though held to a stricter accountability than trustees, on account of their compensation, are nevertheless not liable for a loss without their fault; and they are entitled to manage the property and transact the business in their hands in the usual and accustomed way. *Knight v. Ld. Plymouth*, 3 Atkyns, 480; *Rowth v. Howell*, 3 Vesey, 566; Lewin on Trusts, 332, 3d ed.; *Edwards on Receivers*, 573-599; *White v. Baugh*, 3 Clark & Finnelly, 44. A marshal appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission. *The Rendsberg*, 6 Robinson, 142. "Every man," says Sir

William Scott, "who undertakes a commission incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of that commission? The fair performance of the duties that belong to it. . . . He must provide a competent number of persons to guard the property; having so done he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud." 6 Robinson, 154; see also *Burke v. Trevitt*, 1 Mason, 96, 100. A postmaster is bound to exercise due diligence, and nothing more, in the care of matter deposited in the post-office. He is not liable for a loss happening without his fault or negligence. Soon after the organization of the government post it was attempted to charge the Postmaster-General to the same extent as the common carriers who had previously carried the mails; and the question was elaborately argued in the great case of *Lane v. Cotton et al.*, 1 Lord Raymond, 646, and Lord Chief Justice Holt strenuously contended for that view; but it was decided that the postmaster was only liable for his own negligence; and this case was followed by Lord Mansfield and the whole court, three-quarters of a century later, in the case of *Whitfield v. Le Despencer*. Cowper, 754; see Story on Bailments, § 463; *Dunlop v. Munroe*, 7 Cranch, 242.

In certain cases, it is true, a more stringent accountability is exacted; as in the case of a sheriff, in reference to prisoners held by him in custody, where the law puts the whole power of the county at his disposal, and makes him liable for an escape in all cases, *except* where it is caused by an act of God or the public enemy. 33 Hen. VI. p. 1; Brooke's Abridgment, tit. Dette, 22; Dalton's Sheriff, 485; Watson on Sheriffs, 140. The exception which thus qualifies the severest exaction of official responsibility known at the common law is worthy of particular notice. The reason for applying so severe a rule in cases of escape is probably founded in motives of public safety. Chief Justice Gibson, in *Wheeler v. Hambright*, 9 Sergeant & Rawle, 396, says: "The strictness of the law in this respect arises from public policy." Lord Chief Justice Holt, in his dissenting opinion in *Lane v. Cotton*, also held that the sheriff was responsible in the same strict manner for goods seized in execution; but he cited no authority for the opinion, and the general rule of responsibility is certainly much short of that.

The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change the common-law rule of responsibility. And with regard to the public moneys, as they often accumulate in large sums in the hands of collectors, receivers, and depositaries, and as they are susceptible of being embezzled and privately used without detection, and are often difficult of identification, legislation is frequently adopted for the purpose of holding such officers to a very strict accountability.

And in some cases they are spoken of as though they were absolute debtors for, and not simply custodians of, the money in their hands. In New York, in the case of *Muzzy v. Shattuck*, 1 Denio, 233, the court, after a careful examination of the statutory provisions respecting the duties and liabilities of a town collector, came to the conclusion (contrary to its previous decision in *The Supervisors v. Dorr*, 25 Wendell, 440), that he was liable as a *debtor*, and not merely as a *bailee*, for the moneys collected by him, and consequently that he could not excuse himself, in an action on his bond, by showing that, without his fault, the money had been stolen from his office.

Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the non-performance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law. Bacon's Abridgment, tit. Statute, I, 4.

The acts of Congress with respect to the duties of collectors, receivers, and depositaries of public moneys, it must be conceded, manifest great anxiety for the due and faithful discharge by these officers of their responsible duties, and for the safety and payment of the moneys which may come to their hands. They are expressly required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or in their possession or custody, till ordered by the proper department or officer to be transferred or paid out; and where such orders for transfer or payment are received faithfully and promptly to make the same as directed. 9 Stat. at Large, 61, § 9. To obviate all excuse for casual losses, it is provided that they shall be allowed, under the direction of the Secretary of the Treasury, all necessary additional expenses for clerks, fire-proof chests or vaults, or other necessary expenses of safekeeping, transferring, and disbursing said moneys. Ib. 62, § 13. And it is expressly made embezzlement and a felony, for an officer charged with the safekeeping, transfer, and disbursement of the public moneys, to convert them to his own use, or to use them in any way whatever, or to loan them, deposit them in bank, or to exchange them for other funds except as ordered by the proper department or officer. Ib. 63, § 16. Every receiver of public money is required to render his accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to the prompt settlement thereof, within three months after the expiration of each quarter, subject, however, to the control of the proper department.

3 Id. 723, § 2. Besides this, all such officers are required to give bonds with sufficient sureties for the due discharge of all these duties. 1 Id. 705; 2 Id. 75; 9 Id. 60, 61, &c. And upon making default and being sued, prompt judgment is directed to be given, and no claim for a credit is to be allowed unless it has been first presented to the accounting officers of the treasury for examination and disallowed, or unless it be shown that the vouchers could not be procured for that purpose, by reason of absence from the country, or some unavoidable accident. 1 Id. 514, §§ 3, 4.

These provisions show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into bond with sufficient sureties for the performance of their duties, and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same. In the leading case of *The United States v. Prescott*, 3 Howard, 587 (which was an action on a similar bond to that now under consideration), the court say: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and the principles which are founded on public policy." After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required, "The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond."

This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, as now contended for by the government. But that case was one in which the defence set up was that the money was stolen, and a much more limited responsibility than that indicated by the above language would have sufficed to render that defence nugatory. And as the money in the hands of a receiver is not his; as he is only custodian of it; it would seem to be going very far to say, that his engagement to have it forthcoming was so absolute, as to be qualified by no condition whatever, not even a condition implied in law. Suppose an earthquake

should swallow up the building and safe containing the money, is there no condition implied in the law by which to exonerate the receiver from responsibility? ¹

Judgment affirmed.

PRESTON v. PRATHER.

SUPREME COURT OF THE UNITED STATES, 1891.

[137 U. S. 604.]

THE plaintiffs below, the defendants in error here, were citizens of Missouri, and for many years have been copartners, doing business at Maryville, in that State, under the name of the Nodaway Valley Bank of Maryville. The defendants below were citizens of different States, one of them of Michigan and the others of Illinois, and for a similar period have been engaged in business as bankers at Chicago, in the latter State. In 1873 the plaintiffs opened an account with the defendants, which continued until the spring of 1883. The average amount of deposits by them with the defendants each year during this period was between two and four hundred thousand dollars. Interest was allowed at the rate of two and one-half per cent on the deposits above three thousand dollars, but nothing on deposits under that sum.

On the 7th of July, 1880, the plaintiffs purchased of the defendants four per cent bonds of the United States to the nominal amount of twelve thousand dollars; but, the bonds being at a premium in the market, the plaintiffs paid for them, including the accrued interest thereon, thirteen thousand and five dollars. The purchase was made upon a request by letter from the plaintiffs; and all subsequent communications between the parties respecting the bonds, and the conditions upon which they were to be held, are contained in their correspondence. The letter directing the purchase concluded with a request that the defendants send to the plaintiffs a description and the numbers of the bonds, and hold the same as a special deposit. In the subsequent account of the purchase rendered by the defendants the plaintiffs were informed that the bonds were held on special deposit subject to their order. The numbers of the bonds appear upon the bond register kept by the defendants, and the bonds remained in their custody until some time between November, 1881, and November, 1882, when they were stolen and disposed of by their assistant cashier, one Ker, who absconded from the State on the 16th of January, 1883. The present action was brought to recover their value.

It appeared that about a year before he absconded, information was given to the bank that some one in its employ was speculating on the Board of Trade in Chicago, and an inquiry revealed the fact that Ker

¹ The remainder of the opinion, in which the effect of the bond as a special contract was discussed, is omitted. On that point see *Smythe v. U. S.*, 188 U. S. 156. — ED.

was that person. Although he was supposed to be dependent entirely on his salary, and although he had free access to the vaults where the securities of the bank, including these bonds, were deposited, he was continued in the service of the bank until the theft took place.

At the trial a jury was waived by stipulation. The court found special findings of fact, which were not excepted to, and gave judgment for the plaintiffs. 29 Fed. Rep. 498. The defendants sued out this writ of error.

FIELD, J. By the defendants it was contended below in substance, and the contention is renewed here, that the bonds being placed with them on special deposit for safe-keeping, without any reward, promised or implied, they were gratuitous bailees, and were not chargeable for the loss of the bonds, unless the same resulted from their gross negligence, and they deny that any such negligence is imputable to them.

On the other hand, the plaintiffs contended below, and repeat their contention here, that, assuming that the defendants were in fact simply gratuitous bailees when the bonds were deposited with them, they still neglected to keep them with the care which such bailees are bound to give for the protection of property placed in their custody; and further, that subsequently the character of the bailment was changed to one for the mutual benefit of the parties.

Much of the argument of counsel before the court, and in the briefs filed by them, was unnecessary — indeed, was not open to consideration — from the fact that the case was heard, upon stipulation of parties, by the court without the intervention of a jury, and its special findings cover all the disputed questions of fact. There is in the record no bill of exceptions taken to rulings in the progress of the trial, and the correctness of the findings upon the evidence is not open to our consideration. Rev. Stat. § 700. The question whether the facts found are sufficient to support the judgment is the only one of inquiry here.

Undoubtedly, if the bonds were received by the defendants for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would

be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text-writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See *Steamboat New World v. King*, 16 How. 469, 474, 475; *Railroad Co. v. Lockwood*, 17 Wall. 357, 383; *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489, 494. The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employees and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment.

Thus, in *Foster v. Essex Bank*, 17 Mass. 479, the bank was, in such a case, exonerated from liability for the property intrusted to it, which had been fraudulently appropriated by its cashier, the Supreme Judicial Court of Massachusetts holding that he had acted without the scope of his authority, and, therefore, the bank was not liable for his acts any more than it would have been for the acts of a mere stranger. In that case a chest containing a quantity of gold coin, which was specified in an accompanying memorandum, was deposited in the bank for safe-keeping, and the gold was fraudulently taken out by the cashier of the bank and used. It was held, upon the doctrine stated, that the bank was not liable to the depositor for the value of the gold taken.

In the subsequent case of *Smith v. First National Bank in Westfield*, 99 Mass. 605, 611, the same court held that the gross carelessness which would charge a gratuitous bailee for the loss of property must be such as would affect its safe-keeping, or tend to its loss, implying that liability would attach to the bailee in such cases, and to that extent qualifying the previous decision.

In *Scott v. National Bank of Chester Valley*, 72 Penn. St. 471, 480, the Supreme Court of Pennsylvania asserted the same doctrine as that in the Massachusetts case, holding that a bank, as a mere depository, without special contract or reward, was not liable for the loss of a government bond deposited with it for safe-keeping, and afterwards stolen by one of its clerks or tellers. In that case it was stated that the teller was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks, but this fact was not allowed to control the decision, on the ground that it was unknown to the officers of the bank that the teller gambled in stocks until after he had absconded, but at the same time observing that:

“No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this

species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed."

As stated above, the reasonable care which persons should take of property intrusted to them for safe-keeping without reward will necessarily vary with its nature, value and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.

It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court to its conclusion that they were guilty of gross negligence. It was shown that about a year before the assistant cashier absconded the defendant Kean, who was the chief officer of the banking institution, was informed that there was some one in the bank speculating on the Board of Trade at Chicago. Thereupon Kean made a quiet investigation, and the facts discovered by him pointed to Ker, whom he accused of speculating. Ker replied that he had made a few transactions, but was doing nothing then and did not propose to do anything more, and that he was then about a thousand dollars ahead, all told. It was not known that Ker had any other property besides his salary. His position as assistant cashier gave him access to the funds as well as the securities of the bank, and he was afterwards kept in his position without any effort being made on the part of the defendants to verify the truth of his statement, or whether he had attempted to appropriate to his own use the property of others.

Again, about two months before Ker absconded, one of the defend-

ants, residing at Detroit, received an anonymous communication, stating that some one connected with the bank in Chicago was speculating on the Board of Trade. He thereupon wrote to the bank, calling attention to the reported speculation of some of its employees, and suggesting inquiry and a careful examination of its securities of all kinds. On receipt of this communication Kean told Ker what he had heard, and asked if he had again been speculating on the Board of Trade. Ker replied that he had made some deals for friends in Canada, but the transactions were ended. The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed. Upon this subject the court below, in giving its decision, *Prather v. Kean*, 29 Fed. Rep. 498, after observing that the defendants knew that Ker had been engaged in business which was hazardous and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous speculations, embezzlements, forgeries and thefts plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur.

The second position of the plaintiffs is also well taken, that, assuming the defendants were gratuitous bailees at the time the bonds were placed with them, the character of the bailment was subsequently changed to one for the mutual benefit of the parties. It appears from the findings that the plaintiffs, subsequently to their deposit, had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and that such discounts were made. When the notes thus secured were paid, and the defendants called upon the plaintiffs to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously. The plaintiffs had already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as security for such overdrafts. From these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and the accounts show that they did subsequently overdraw in numerous instances.

The deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties, that is to say, both were interested in the transactions. For the bailor it obtained the loans, and to that extent was to his advantage; and to the bailee it secured the payment of the loans, and that was to his ad-

vantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence.

Two cases cited by counsel, one from the Court of Appeals of Maryland and the other from the Court of Appeals of New York, declare and illustrate the relation of parties under conditions similar to those of the parties before us.¹

It follows, therefore, that whether we regard the defendants as gratuitous bailees in the first instance, or as afterwards becoming bailees for the mutual benefit of both parties, they were liable for the loss of the bonds deposited with them. And the measure of the recovery was the value of the bonds at the time they were stolen.

Judgment affirmed.

GRADY v. SCHWEINLER.

SUPREME COURT OF NORTH DAKOTA, 1907.

[113 N. W. Rep. 1031.]

MORGAN, C. J. Plaintiff brings an action for damages against the defendant for the value of a stallion delivered by him to the defendant on a contract of bailment. The stallion was delivered to the defendant for serving his mares for the agreed sum of \$5 a foal. The complaint alleges plaintiff's ownership of the stallion, the value thereof, his delivery to the defendant under an express contract that defendant would return him to the plaintiff, and, in case that he should be unable to return him, then defendant would pay plaintiff the value of said stallion, and that plaintiff demanded his return to him or payment of the value thereof, which was refused by the defendant. Judgment is demanded for the sum of \$400. The answer admits that said stallion was delivered to the defendant for the purposes alleged in the complaint, but denies that he agreed to pay for said stallion in case of his inability to return him upon demand. The answer further alleges that the stallion was sick when delivered to defendant, and that plaintiff knew of such sickness, and, that in consequence of such sickness, the stallion died soon after his delivery to defendant, without any fault or negligence on his part. A jury was impanelled, and, at the close of plaintiff's case, the trial court directed a verdict for the defendant, and

¹ The court here examined the cases of *Third Nat. Bank v. Boyd*, 44 Md. 47, and *Cutting v. Marlor*, 78 N. Y. 454. — ED.

judgment was thereafter entered on the verdict, and plaintiff has appealed from said judgment.

The only assignments of error relate to the action of the court in directing a verdict for the defendant. These assignments render it necessary to determine plaintiff's rights under the contract as set forth in plaintiff's evidence. The motion for a directed verdict was based upon the alleged grounds that the evidence shows that the stallion died before the contract of hire under which he was turned over to defendant had terminated, without any fault or negligence on defendant's part, and that the contract of hire was not binding on defendant for the reason that a return of the stallion became impossible by reason of his death without any fault on defendant's part. The question is squarely presented whether plaintiff can recover under the facts, independent of any question of negligence or fault on defendant's part. The complaint contains no allegation of fault or negligence as a basis for recovery, but is framed upon the theory of liability on a contract of hiring, and in addition, of insurance, if the horse was not returned. Plaintiff's evidence was as follows, which must be assumed to be true for the purposes of this appeal: Plaintiff testified: "He said: 'I will take the horse and return him in as good or better shape than I get him, and, if I don't, I will pay for him. I am good for him.' I agreed to let him have the horse to breed his mares at \$5 a colt, provided he returned the horse as he got him, and, if he did n't, he should pay for him. Mr. Schweinler said he would take him on those terms, and, if he did n't return him as good as he got him, he would pay for him." A witness for plaintiff testified: "Mr. Schweinler said he would fetch the horse back in as good condition as he took him, or, if anything happened, he would pay for him." The appellant's contention is that the relative rights of the plaintiff and defendant, as bailor and bailee, must be determined from the contract of bailment, and not by the general rules of liability under the law of bailments. We have no doubt of the correctness of this contention. Parties are permitted to make their own contracts in reference to their mutual rights and liabilities under bailments of property as well as in reference to other subjects, but, of course, are not permitted to contract in contravention of positive law or public policy, and perhaps may not in all cases relieve themselves from the results of their own negligence. In this case the language was positive and unequivocal that the bailee was to pay for the horse if he was unable to return him for any reason. If anything happened to the horse, making a return impossible, payment was to be made. This language permits of no exceptions, but implies an unconditional liability if the horse could not be returned. It does not permit of the meaning that the horse was to be paid for only in case of its loss through the bailee's fault or negligence. It creates the bailee an insurer of the return of the horse when the purposes of the bailment had been accomplished and a return demanded. The authorities firmly indorse this principle. As stated by Schouler in his work on

Bailments, § 106: "Whatever lawful terms may have been introduced by their contract for the purpose of qualifying the method or risk of performance should be given full force, whether expressly set forth or only implied." In *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60, the court said: "The principle that lies at the foundation of the series of authorities, English and American, on this question, is that the party must perform his contract, and, if loss occurs by inevitable accident, the law will let it rest upon the party, who has contracted that he will bear it." In that same case the following was cited with approval: "Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract. If a party entered into an absolute contract, without any qualifications or specifications, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract, and either do the act or pay damages, if liability arises from his own direct and positive undertaking." In *Drake v. White*, 117 Mass. 12, the court said: "In the present case the parties have reduced their contract to writing and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things — either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the party might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But, however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and, if the parties have im-providently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of these rules." In *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496, the court said: "If the defendant contracted to keep the watch in the vault of the bank, and if it was lost by reason of his failure to do so, he was liable without regard to the general principles of the law of bailment. He had made a contract, and he was liable for all damages resulting from his failure to perform it. If he had no right to keep the watch in the vault, that was his affair, and not the bailor's. The contract was not to keep the watch in the vault if the bank permitted it, but it was absolute; and it was the pledgee's business to see that he had authority to keep it there. If he had not, he should not have made the contract." See also *Hale on Bailments & Carriers*, p. 28, and cases cited; *Lance v. Griner*, 53 Pa. 204; 5 Cyc. p. 185, and cases cited; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Harvey v. Murray*, 136 Mass. 377; *Rohrabacher v. Ware*, 37 Iowa, 85; *Standard Brewery v. Malting Co.*, 171 Ill. 602, 49 N. E. 507; *Fairmont Coal Co. v. Jones & Adams Co.*,

134 Fed. 711, 67 C. C. A. 265; *Reinstein v. Watts*, 84 Me. 139, 24 Atl. 719; *Austin v. Miller*, 74 N. C. 274.

Respondent contends that the contract imposes only such liability as the law would impose without it. Without any special contract, the law would impose on the defendant the duty to use ordinary care, and, in case of the death of the animal without defendant's fault, he would not be responsible. In this case, as we have shown, the contract went further, and enlarged the obligations of the bailee in respect to those devolving on him where no special contract exists. The principle contended for, therefore, has no application. The fact that the horse died while in defendant's possession without his fault is not a defence in view of the existing contract shown by the evidence and presumed to be true for the purposes of this appeal. The plaintiff having alleged and proved the contract, a breach thereof, demand, and a refusal to comply therewith, stated a cause of action in the complaint, and the same was established by the evidence without any showing of negligence.

The judgment is reversed, a new trial granted, and the cause remanded for a new trial. All concur.

JENKINS v. BACON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1873.

[111 *Mass.* 373.]

CONTRACT with counts in tort. The first three counts were in contract. The first alleged that the plaintiff intrusted to the defendant a United States bond for \$500, to be kept for the benefit of the plaintiff until called for; that the defendant agreed so to keep it and to deliver it to the plaintiff on demand, in consideration of services which had been rendered by the plaintiff to the defendant; and that the plaintiff demanded it and the defendant neglected and refused to deliver it.¹

At the trial in the Superior Court, before *Pitman, J.*, it appeared "that at the time of the transaction between the plaintiff and the defendant relating to the bond, the plaintiff was about to proceed upon a voyage to the East Indies, which voyage lasted between three and four years; that the defendant kept the bond in his safe with his own papers and effects for nearly a year after the departure of the plaintiff on the voyage; that when the first six months' interest on the bond became due, the defendant's bookkeeper cut the coupon therefor from the bond and sent it by mail to the plaintiff's wife at West Barnstable; that she, by letter to the bookkeeper, acknowledged the receipt thereof; that in the spring of 1865 the defendant, finding the bond in his safe, directed his bookkeeper to send it to the plaintiff's wife at West Barn-

¹ The other counts are omitted. — *ED.*

stable, but gave no directions as to how it was to be sent; that the bookkeeper mailed it to the plaintiff's wife; and that it never reached her."

The plaintiff testified "that he requested the defendant to purchase the bond for him and to take care of it, or keep it for him, (but was unable to say which form of expression was used;) that the defendant agreed to do as he requested; that he expected the interest on the bond, as it became due, to be sent to his wife at West Barnstable, or held and placed to his credit by the defendant; and that he never gave the defendant or any agent of his direction to send the bond to his wife."

The plaintiff called his wife as a witness, and asked her whether she ever gave the defendant or his bookkeeper any directions or orders to send the bond to her, to which question she replied she had not.

It was admitted by the plaintiff that the defendant was to receive no compensation for his services, and that whatever the defendant's undertaking in relation to the bond was, it was gratuitous.

Among other things the defendant asked the judge to instruct the jury as follows: "If the defendant undertook and agreed in relation to the bond as the plaintiff alleged, and afterwards, without authority express or implied from the plaintiff, gave directions to his bookkeeper to send the bond to the plaintiff's wife, and the bond was sent to her by mail and lost therefrom, the defendant is not liable to the plaintiff for the value thereof, unless the jury are of the opinion that such directions by the defendant were fraudulent, grossly negligent or grossly careless. The fact that the plaintiff offered his wife as a witness, and asked her whether she at any time gave directions or orders that the bond be sent to her, is one from which the jury may infer that she was the agent of the plaintiff during his absence at sea."

The judge declined so to instruct the jury, but instructed them "that the plaintiff might recover by proving either gross negligence of the defendant in the care and custody of the plaintiff's property, or, without respect to the particular degree of care shown, by proof that the defendant took the bond upon the agreement to keep it for the plaintiff, and thereafter, without authority express or implied, sent it to the plaintiff's wife or directed his clerk to do so, and the defendant thereby lost it by a disposition of the bond contrary to the original undertaking." Upon the other branch of the case, the judge instructed the jury as to what would constitute gross negligence in a manner not excepted to.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

AMES, J. In that class of bailments described in the text books under the title of "deposits," the obligation of the bailee is that he will keep the thing deposited with reasonable care, and that he will upon request restore it to the depositor, or otherwise deliver it according to the original trust. According to the well settled rule,

the bailee who acts without compensation can only be held responsible for bad faith, or gross negligence, if the deposit should be lost or injured while in his custody. *Whitney v. Lee*, 8 Met. 91; *Foster v. Essex Bank*, 17 Mass. 479. Except as to the degree of diligence and care required of him, his general obligation is the same as if he had assumed the trust upon the promise or with the expectation of reward. If he should deliver the property to a person not authorized to receive it, he would make himself responsible for its value, without regard to the question of due care or the degree of negligence. *Hall v. Boston & Worcester Railroad Co.*, 14 Allen, 439; *Lichtenhein v. Boston & Providence Railroad Co.*, 11 Cush. 70; *Cass v. Boston & Lowell Railroad Co.*, 14 Allen, 448, 453; 2 Kent Com. (6th ed.) 568. If the case of *Heugh v. London & North Western Railway Co.*, L. R. 5 Ex. 51, can be said to present a case of delivery to the wrong person, (which is open to considerable doubt,) the doctrine there asserted is directly opposed to the above cited decisions of this court. Good faith requires, even in the case of a gratuitous bailment, that the bailee should take reasonable care of the deposit; and what is reasonable care must materially depend upon the nature, value and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties. Story on Bailments, § 62.

In this instance, the transaction was more than a simple deposit for safe keeping. The plaintiff claimed, and there was evidence, which was not contradicted or rebutted, to the effect that the defendant was to collect the coupons as they became due, for the benefit of the plaintiff's wife. The bond was delivered to the defendant in trust; he accepted the trust and entered upon its performance. "The owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management." Lord Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909. Notwithstanding the gratuitous character of the bailment, "it is held that the bailor has a remedy, in an action *ex contractu*, if the bailee do not perform his undertaking, and that there is a sufficient consideration to support a contract." Metcalf Con. 164, and cases there cited. In *Robinson v. Threadgill*, 13 Ired. 39, it was held that if one undertakes to collect notes for another, without mentioning any consideration, and takes the notes for that purpose, there is a sufficient legal consideration for the engagement. A mere agreement to undertake a trust *in futuro* without compensation is not obligatory; but when once undertaken and the trust actually entered upon, the bailee is bound to perform it according to the terms of his agreement. *Rutgers v. Lucet*, 2 Johns. Cas. 92; *Smedes v. Utica Bank*, 20 Johns. 372, 379. Upon this point the authorities are numerous. They are fully cited in 1 Parsons Con. (5th ed.) 447; and 2 Parsons Con. 99; and in Chitty Con. (10th Am. ed.) 38-40, notes *n* and *u*. And it is well settled that the remedy is not confined to an action of tort, but that contract will lie.

The substance of the defendant's contract and duty was to keep the deposit with reasonable care, and to restore it when properly called upon. We do not interpret this contract as restricting him to one place or uniform mode of keeping. All that could reasonably be expected of him was that he should keep it with his own papers, and in the same manner and with the same degree of care, as a man of ordinary prudence would exercise in the custody of papers of his own of like character. Circumstances might occur which would render it reasonable and proper that he should change the place of deposit. If his own place of business should be destroyed by fire, or if, from change of residence or temporary absence from the country, or for other sufficient reason, it should become inconvenient or unsafe that he should retain the manual possession of the bond, he would undoubtedly be at liberty to deposit it in any other place or mode, in which he with reasonable prudence might deposit his own property of the like description. But, as between the original depositor and himself, he would continue to be the lawful and responsible custodian, and bound to practise that degree of care which the law requires of gratuitous bailees. The complaint against him is, not that he kept it negligently, or lost it by gross carelessness, but that he intentionally disposed of it in a manner not authorized by the terms of the trust. For the purposes of this case, it is wholly immaterial whether the post-office furnishes a reasonably safe mode of transmission, in the case of valuable papers of such a description, or not. The question of due diligence or gross neglect, in our opinion, is not raised by the bill of exceptions.

A case recently decided in New York, *Kowing v. Manly*, 49 N. Y. 192, is in its leading features analogous to that now before us. In that case certain bonds had been left with the defendants with instructions in writing not to deliver them to any person except upon the written order of the plaintiff, who was the depositor. The bonds were subsequently delivered by the defendants to the plaintiff's wife upon her presentation of an order purporting to be signed by him, which was in fact a forgery. The defendants were held accountable for the value of the bonds, not on the ground of any want of due and reasonable care, but because they had disposed of them in a manner not authorized by the contract. The fact that their instructions were expressed in writing could add nothing to the duties required of them by their contract. They were held liable for the reason that they had no authority to do what the defendant in this case attempted to do; and because such a delivery to the wife was a violation of their trust.

In *Stewart v. Frazier*, 5 Ala. 114, the defendant had received money to be kept for the plaintiff, without compensation. No instructions had been given to the defendant to remit the money, but from kindness and the best intentions he undertook to remit it by the hands of a person "reputed to be an honest man." The money was lost, and the defendant was held responsible, on the ground that it was a case

in which the plaintiff was exposed to a risk to which he had not consented. The court say "the law would be the same if the public mail had been resorted to, instead of a private conveyance." They add that the question of gross negligence in the transmission of the money does not arise, as the defendant "had no authority to transmit, in any mode, either express or implied."

As we have already remarked, if the defendant had delivered the bond by mistake to a person not entitled to receive it, he would make himself responsible, without regard to the question of due care, or degree of negligence. His duty was to keep the deposit; he could not dispose of it without the express or implied authority of the depositor. It will not be contended that the case shows any express authority for sending it by mail to the plaintiff's wife, and certainly none can be implied from the circumstances. In so doing, he subjected the plaintiff to a risk which he had not contemplated, and did an act not authorized by the terms of his trust. It was left to the jury to say whether, in the words of the presiding judge, it was "a disposition of the bond contrary to the original understanding," whereby the defendant lost it.

The result is that we find no error in the course of the trial in this part of the case.

The fact that the plaintiff offered his wife as a witness to prove that she did not authorize or direct that the bond should be sent to her, would not have justified an inference by the jury that she was his agent during his absence at sea. The defendant therefore was not entitled to the second ruling which he requested of the court.

The defendant's demurrer to the declaration for the alleged misjoinder of tort and contract was properly overruled. It is sufficiently averred in the declaration itself that the counts are for the same cause of action, and this averment removes the objection upon which the defendant relies. Gen. Sts. c. 129, § 2, cl. 5.

The majority of the court, therefore, concur in the order,

Exceptions overruled.

MORTON, J., dissented.¹

LILLEY v. DOUBLEDAY.

QUEEN'S BENCH DIVISION, 1881.

[7 Q. B. D. 510.]

MOTION to enter judgment for the plaintiff pursuant to the findings of the jury. A rule for a new trial, on the ground that the findings were wrong, was disposed of in the course of the argument. The action was to recover the value of certain drapery goods warehoused by the defend-

¹ The dissenting opinion is omitted. — ED.

ant for the plaintiff, which were destroyed by fire. The contract was that the goods should be deposited at the defendant's repository at Kingsland Road, but a portion of them were deposited by the defendant elsewhere, and a fire occurring they were destroyed. The plaintiff had insured the goods, giving Kingsland Road as the place where they were deposited, and in consequence lost the benefit of the insurance.

GROVE, J. I think the plaintiff is entitled to judgment. It seems to me impossible to get over this point, that by the finding of the jury there has been a breach of contract. The defendant was intrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property intrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis v. Garrett*, 6 Bing. 716, which contains very little that is not applicable to this case. It was argued that that case was decided on the ground that the defendant was a common carrier, but that is not the ground of the judgment of Tindal, C. J., who decided that as the loss had happened while the wrongful act of the defendant was in operation and was attributable to his wrongful act, he could not set up as an answer to the action the bare possibility of the loss if his wrongful act had never been done, and he illustrated the case by saying that a defendant who had by mistake forwarded a parcel by the wrong conveyance, if a loss had thereby ensued, would undoubtedly be liable. I do not give any opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in a manner different from that in which he contracted to deal with it. The only case that would have made me hesitate is *Hobbs v. London and South Western Ry. Co.*, Law Rep. 10 Q. B. 111, and that we are told has some doubt thrown on it in a recent case in the Court of Appeal, *M'Mahon v. Field*, 7 Q. B. D. 591, at all events the doubt induced by the former case is not strong enough to make me alter the opinion I have expressed on this one. There will, therefore, be judgment for the plaintiff.

LINDLEY, J. I am of the same opinion. The plaintiff gave his goods to the defendant to be warehoused at a particular place, the defendant warehoused them elsewhere, where, without any particular negligence on his part, they were destroyed. The consequence is that the plaintiff has a cause of action and is entitled to damages. The question is, what damages? *Hadley v. Baxendale*, 9 Ex. 341, is wide of the mark, because the question here is whether the defendant was responsible for the goods, and if so the damages must be their value. Then, it is further said that the defendant was responsible only for want of reason-

able care, but is that so when he has departed from his authority in dealing with the goods. I give no opinion whether there is a conversion of the goods; the question is, what answer has the defendant to the plaintiff who asks for them back. Can he say he will neither return the goods nor pay their value. I think he cannot. The reasoning in *Davis v. Garrett*, 6 Bing. 716, is applicable to this case, and *Burrows v. March Gas and Coke Co.*, Law Rep. 5 Ex. 67: on appeal, Law Rep. 7 Ex. 96, shows that the damage is not too remote.

STEPHEN, J., concurred.

Judgment for the plaintiff.

CHAPTER II.

NATURE OF THE UNDERTAKING.

CITIZENS' BANK v. NANTUCKET STEAMBOAT CO.

CIRCUIT COURT OF THE UNITED STATES, 1811.

[2 *Story*, 16.²]

STORY, J. This cause has come before the court under circumstances, involving some points of the first impression here, if not of entire novelty; and it has been elaborately argued by the counsel on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment.

The suit is in substance brought to recover from the Steamboat Company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the Island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which it was lost, do not appear distinctly in the evidence; and are no otherwise ascertained, than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him; but exactly how and at what time he does not know. The libel is not *in rem*, but *in personam*, against the Steamboat Company alone; and no question is made (and in my judgment there is no just ground for any such question), that the cause is a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction; and, therefore, it is properly to be entertained by this court upon the appeal.

There are some preliminary considerations suggested at the argument, which it may be well to dispose of, before we consider those, which constitute the main points of the controversy. In the first place, there is no manner of doubt, that steamboats, like other vessels, may be employed as common carriers, and when so employed their owners are liable for all losses and damages to goods and other property in-

¹ Compare: *East India Co. v. Pullen*, 2 *Strange*, 690; *Brind v. Dale*, 8 C. & P 207; *Liver Alkali Co. v. Johnson*, L. R. 9 Ex. 338. — ED.

² This case is abridged. — ED.

trusted to them as common carriers to the same extent and in the same manner, as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties, and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations, and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the drivers employed by them, to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori*, they would not be liable for the carriage of parcels of money, or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend, that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence, to a passenger, whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily em-

ployed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see, how the court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.

In the next place, I take it to be exceedingly clear, that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry, whether in point of fact the respondents were carriers of money and bank notes and checks for hire or recompense, or not. I agree, that it is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the company. And I farther agree, that it is by no means necessary, that if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining what the true understanding of the parties is, as to the character of the bailment.

In the next place, if it should turn out, that the Steamboat Company are not to be deemed common carriers of money and bank bills; still, if the master was authorized to receive money and bank bills as their agent, to be transported from one port of the route of the steamboat to another at their risk, as gratuitous bailees, or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank bills have been lost, the company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter; upon the plain ground, that they are responsible

for the gross negligence of their agents within the scope of their employment.

[Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, the Steamboat Company were not, nor held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandises, in the strict sense of the latter terms; the employment of the steamboat was, so far as the company are concerned, limited to the mere transportation of passengers and goods and merchandises on freight or for hire; and money and bank bills, although known to the company to be carried by the master, were treated by them, as a mere personal trust in the master by the owners of the money and bank bills, as their private agent, and for which the company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers. . . .

Judgment for defendant.¹]

BUSSEY & CO. v. MISSISSIPPI VALLEY
TRANSPORTATION CO.

SUPREME COURT OF LOUISIANA, 1872.

[24 La. Ann. 165.]

APPEAL from the Fourth District Court, parish of Orleans. THEARD, J.

HOWE, J. The plaintiffs, a commercial firm, sued the defendants, a corporation, whose business is to transport merchandise in their own model barges, and to tow the barges of other parties for hire between St. Louis and New Orleans.

The bill of lading, given by defendants to plaintiffs, recites the receipt from plaintiffs of one barge loaded with hay and corn, "in apparent good order in tow of the good steamboat 'Bee' and barges," "to be delivered without delay in like good order (the dangers of navigation, fire, explosion, and collision excepted) to Bussey & Co., at New Orleans, Louisiana, on levee or wharf boat, he or they paying freight at the rate annexed, or \$700 for barge, and charges \$267.50." . . . "It is agreed with shippers," the bill continues, "that the 'Bee' and barges are not accountable for sinking or damage to barge, except from gross carelessness."

It was alleged by plaintiffs that defendants had neglected to deliver the barge and her valuable cargo according to their contract. The defendants answered by a general denial, and by a recital of what they claimed to be the circumstances of the loss of the barge and cargo. In

which they contended they were without blame; and that loss did not result from gross carelessness on their part, and they were not liable under the bill of lading. Other defences were raised by the answer which have been abandoned.

The court *a qua* gave judgment for plaintiffs for the amount claimed as the value of the barge and cargo, \$15,272.60, with interest from judicial demand, and defendants appealed.

The appellants contend, as stated in their printed argument,

"*First*—That they are not common carriers, or rather that their undertaking in this, or like cases, is not that of a common carrier.

"*Second*—That they are liable, if liable at all, only in case of gross carelessness.

"*Third*—That the restriction of liability contained in the agreement to tow the barge in question exonerates them, except in case of gross carelessness—as the appellants were bound to use but ordinary prudence, even if they were common carriers.

"*Fourth*—That the judgment rendered is for a larger amount than the testimony will authorize."

The question whether a towboat under the circumstances of this particular case is a common carrier has been long settled in the affirmative in Louisiana; and the reasoning by which Judge Matthews supported this conclusion in the leading case of *Smith v. Pierce*, 1 La. 354, is worthy of the sagacity for which that jurist was pre-eminent. The same opinion was clearly intimated by the Supreme Court of Massachusetts in the case of *Sproul v. Hemmingway*, 14 Pick. 1, in which Chief Justice Shaw was the organ of the court.

In the case also of *Alexander v. Greene*, 7 Hill, 533, the Court of Errors of New York seem to have been of the same opinion. Four of the senators in giving their reasons distinctly state their belief that the towboat in that case was a common carrier, and Judge Matthews' decision is referred to in terms of commendation as a precedent. It is true that Mr. Justice Bronson, whose opinion was thus reversed, in a subsequent case declares (2 Coms. 208) that nobody could tell what the Court of Errors did decide in *Alexander v. Greene*, but the facts remain as above stated, and the effect of the case cannot but be to fortify the authority of the decision in 1 La.

In addition to these authorities we have the weighty opinion of Mr. Kent who includes "steam towboats" in his list of common carriers, 2 Kent, 599, and of Judge Kane in 13 L. R. 399. On the other hand, Judge Story seems to be of a different opinion (Bailments, § 496), and Mr. Justice Grier differed from Judge Kane.

So, too, the Supreme Court of New York, in *Caton v. Rumney*, 13 Wend. 387, and *Alexander v. Greene*, 3 Hill, 9; the Court of Appeals of the same State in *Well v. Steam Nav. Co.*, 2 Coms. 207; the Supreme Court of Pennsylvania in *Leonard v. Hendrickson*, 18 State, 40, and *Brown v. Clegg*, 63 State, 51; and the Supreme Court of Maryland in *Penn. Co. v. Sandridge*, 8 Gill & J. 248, decided that tugboats in these

particular cases were not common carriers. We are informed that the same decision was made in the case of the "Neaffie," lately decided in the United States Circuit Court in New Orleans.

Such conflict of authority might be very distressing to the student, but for the fact that when these writers and cases cited by them are examined the discrepancy, except in the decision in 63 Penn., is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed *termini*. Such were the facts in some form as stated or assumed in *Caton v. Rumney*, 13 Wend., and *Alexander v. Greene*, 3 Hill, cited by Judge Story in the case of the "Neaffie," and in the cases above quoted from 2 Coms., 18 Penn. St., and 8 Gill & J.; and it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed *termini*, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. Story on Bail. § 495. And it was probably to a towboat employed in this way that Mr. Kent referred in the passage quoted above; and that the Supreme Court of Massachusetts had in mind in the 14 Pick.; and see also *Davis v. Housen*, 6 Rob. 259, and *Clapp v. Stanton*, 20 An. 495. We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.

But conceding that this case as a contract of affreightment must be determined by the law of Missouri (4 Martin, 584), and that by that law the defendants are not common carriers as to the plaintiffs, we think it clear from the evidence of the defendants' own witnesses that they were guilty of "gross carelessness" in their attempt to deliver the plaintiffs' barge with its cargo at the port of New Orleans, and that by this gross carelessness she was sunk, and, with her cargo, destroyed.

What is "gross carelessness"? In an employment requiring skill, it is the failure to exercise skill. *New World v. King*, 16 How. 475. The employment of the defendants certainly required skill. A lack of that dexterity which comes from long experience only, might be swiftly fatal, for but a single plank intervenes between the costly cargo and instant destruction. We have but to read the testimony of defendants' own witnesses, and especially Conley, Turner, Burdeau, and Sylvester,

to see that the attempt to land the barge was made without skill, and that it might easily have been effected with entire safety.

We are of opinion that the judgment was correctly rendered in favor of plaintiffs, but that the amount is somewhat excessive. We find the value of the property lost at this port, less the freight and charges, and a small amount realized from the wreck, to be \$13,268.50.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to the sum of thirteen thousand two hundred and sixty-eight dollars and fifty cents, with legal interest from judicial demand and costs of the lower court, and that as thus amended it be affirmed, appellees to pay costs of appeal.¹

BUCKLAND *v.* ADAMS EXPRESS CO.

SUPREME COURT OF MASSACHUSETTS, 1867.

[97 *Mass.* 124².]

CONTRACT to recover the value of a case of pistols.

BIGELOW, C. J. We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. *Dwight v. Brewster*, 1 Pick. 50, 53; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189; 2 *Redfield on Railways*, 1-16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any

¹ Compare: *The Neaffie*, 1 Abb. C. C. 465; *White v. Winnisimmet Co.*, 7 Cush. 155; *White v. Mary Ann*, 6 Cal. 462. — Ed.

care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such

limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfil the contracts into which he has entered.

Exceptions overruled.

CLARK *v.* BURNS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1875.

[118 *Mass.* 275.]

CONTRACT, for the value of a watch, against the owners of a steamship as common carriers, with counts in tort for negligence, and also counts charging them as innkeepers.¹

GRAY, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing, hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Tower v. Utica Railroad*, 7 Hill, 47; *Abbott v. Bradstreet*, 55 Maine, 530; *Pullman Palace Car Co. v. Smith*, 7 Chicago Legal News, 237.

PINKERTON *v.* WOODWARD.

SUPREME COURT, CALIFORNIA, 1867.

[33 *Cal.* 557.]

RHODES, J.² The definition of an inn, given by Mr. Justice Bayley, in *Thompson v. Lacy*, 3 B. & Ald. 286, as "a house where a travel-

¹ The evidence is omitted. Only so much of the opinion as discussed the liability of the defendants on the counts as innkeepers is given. — ED.

² Only so much of the opinion as describes the nature of an inn is given. — ED.

ler is furnished with everything which he has occasion for while on his way," is comprehensive enough to include every description of an inn: but a house that does not fill the full measure of this definition may be an inn. It probably would not now be regarded as essential to an inn that wine or spirituous or malt liquors should be provided for the guests. At an inn of the greatest completeness entertainment is furnished for the traveller's horse as well as for the traveller, but it has long since been held that this was not essential to give character to the house as an inn. (See *Thompson v. Lacy*, *supra*; 2 Kent, 595; 1 Smith Lead. Cases, notes to *Coggs v. Bernard*; Sto. on Bail. Sec. 475; *Kisten v. Hildebrand*, 9 B. Mon. 74.) In *Wintermute v. Clarke*, 5 Sandf. 247, an inn is defined as a public house of entertainment for all who choose to visit it. The defendant insists that the "What Cheer House" was a lodging house and not an inn; because, as he says, the eating department was distinct from the lodging department. It appears that in the basement of the "What Cheer House," and connected with it by a stairway, there was a restaurant, which was conducted by the defendant and two other persons jointly, and that the three shared the profits. Where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper, and in that capacity, is accustomed to receive travellers as his guests, and solicits a continuance of their patronage, and a traveller relying on such representations goes to the house to receive such entertainment as he has occasion for, the relation of innkeeper and guest is created, and the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper. The rules regulating the respective rights, duties and responsibilities of innkeeper and guest have their origin in considerations of public policy, and were designed mainly for the protection and security of travellers and their property. They would afford the traveller but poor security if, before venturing to intrust his property to one who by his agents, cards, bills, advertisements, sign, and all the means by which publicity and notoriety can be given to his business, represents himself as an innkeeper, he is required to inquire of the employees as to their interest in the establishment, or take notice of the agencies or means by which the several departments are conducted. The same considerations of public policy that dictated those rules demand that the innkeeper should be held to the responsibilities which, by his representations, he induced his guest to believe he would assume. We think the jury were fully warranted by the evidence in finding that the "What Cheer House" was an inn, and that the defendant was an innkeeper; and the Court correctly instructed the jury in respect to those facts.

LEWIS v. NEW YORK SLEEPING CAR CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1887.

[143 *Mass.* 267.]

MORRIS, C. J. The use of sleeping cars upon railroads is modern, and there are few adjudicated cases as to the extent of the duties and liabilities of the owners of such cars. They must be ascertained by applying to the new condition of things the comprehensive and elastic principles of the common law. When a person buys the right to the use of a berth in a sleeping car, it is entirely clear that the ticket which he receives is not intended to, and does not, express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket.

Ordinarily, the only communication between the parties is, that the passenger buys, and the agent of the car company sells, a ticket between two points; but the contract thereby entered into is implied from the nature and usages of the employment of the company.

A sleeping car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger such as he might reasonably carry with him are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the company; and the decided weight of authority supports it. *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474; *Pullman Car Co. v. Gardner*, 3 Penny. 78; *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. (N. S.) 788.

The notice by which the defendant company sought to avoid its liability was not known to the plaintiff, and cannot avail the defendant.

The defendant contends that there was no evidence of negligence on

its part. The fact that two larcenies were committed in the manner described in the testimony is itself some evidence of the want of proper watchfulness by the porter of the car; add to this the testimony that the porter was found asleep in the early morning, that he was required to be on duty for thirty-six hours continuously, which included two nights, and a case is presented which must be submitted to the jury.

We have considered all the questions which have been argued in the two cases before us, and are of opinion that the rulings at the trial were correct.

*Exceptions overruled.*¹

GRAY, C. J., in *Grinnell v. Western Union Telegraph Co.*, 113 Mass. 299 (1873). The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself.

CUMBERLAND TELEPHONE CO. v. BROWN.

SUPREME COURT OF TENNESSEE, 1900.

[104 *Tenn.* 56.]

CALDWELL, J.² Brown was a resident of the city of Nashville, but was temporarily at Hickman, a small village about fifty-eight miles from Nashville, and two miles beyond Gordonsville. The telephone company had an office at Nashville and one at Gordonsville, but none at Hickman.

In the afternoon of September 16, 1897, Brown's son went into the office at Nashville and stated to the operator there that he had an im-

¹ *Acc. Blum v. So. P. P. C. Co.*, 1 *Flip.* 500; *Pullman P. C. Co. v. Adams*, 120 *Ala.* 581; *Pullman P. C. Co. v. Smith*, 73 *Ill.* 360; *Woodruff S. & P. C. Co. v. Diehl*, 84 *Ind.* 474. *Contra*, *Pullman P. C. Co. v. Lowe*, 28 *Neb.* 239. — *Ed.*

² Part of the opinion only is given. — *Ed.*

portant message for his father at Hickman. The operator called the company's agent at Gordonsville, and put the son in communication with him. The son, availing himself of the instrument and connection thus afforded, communicated his message to the Gordonsville agent, who agreed to deliver it at Hickman; and thereupon, according to the usual custom, the Nashville agent demanded and received sixty-five cents in payment of total charges, being twenty-five cents for the transmission of the message to Gordonsville and forty cents for its delivery at Hickman. The message, as written by the agent at Gordonsville, was as follows:

“ NASHVILLE, TENNESSEE, 9-16-97.

“ Mr. J. Thomas Brown, Hickman, Tennessee.

“ Come home immediately. Your daughter is dangerously ill.

“ (Signed)

TOM BROWN.”

Though received at Gordonsville at 5.15 p. m. of that day, and so marked on its face, the message was not delivered until about 8 or 8.30 a. m. the next day, which was near fifteen hours after the agent got it, and some five hours after the sendee's daughter's death, of which he learned thirty minutes later through another message transmitted over the same line, and likewise delivered at Hickman.

The company virtually concedes the foregoing facts; but, nevertheless, denies its liability in this case upon the ground that it had instructed its operators not to receive messages from any one to be by any agent of the company delivered to the sendee, and that the undertaking of the Gordonsville operator to deliver this message at Hickman was, therefore, without authority, and not binding on his principal.

It was in relation to this phase of the case that the trial judge gave the charge against which the first assignment of error in this court is directed. That charge is in this language, namely: “ In the opinion of the court this instruction to employees is of little consequence, under the conceded facts of this case. If the company knowingly permitted its employees, over its own wires, to make such arrangements with customers, ascertained from such employees the cost of delivery beyond the terminus of the line, and there collected from the customer compensation for the entire work, then the fact that under its arrangement with its distant operators they were to receive the pay for the delivery beyond the terminus, could make no difference so far as the customer was concerned; and the negligence of such operator, if proven, would be the negligence of the company itself.”

We are not able to perceive any error in this charge, but on the contrary we regard it as entirely sound.

No instruction of the company to its operators, however formal and peremptory, could prejudice the rights of a customer if it knowingly permitted those agents to conduct its affairs upon a plan in direct conflict with that instruction. The course of business actually pursued by

the company's agents with its knowledge is the proper and legal criterion of its responsibility to its customers. As to the public its legal relation is that indicated by its recognized course of business, so long as the latter does not contravene some rule of positive law or some public policy.

The habitual breach and disregard of the instruction by the operators of the company, with its knowledge, amounts to a practical abrogation of the instruction (*Railroad v. Reagan*, 96 Tenn. 129, 140), and makes the status of the company that which its real course of business imports.

This is equally true, though the company was not bound in the first instance to receive and deliver messages at all, but only to furnish suitable instrumentalities for verbal communication between separated members of the public; for, it had the legal power to assume the additional duty, and could do so as well in the manner indicated as by the promulgation of formal notice of such purpose.

Nor is it of any legal consequence in the present case that the Nashville operator may have testified that he told the sender of this message that the company would not undertake to deliver it, since he concedes that he furnished the connection with the express understanding that the Gordonsville operator was to be requested to deliver it, and with the assurance that he would do whatever he agreed to do about it, and after the arrangement was consummated, collected the charges for delivery as well as for tolls, and turned the same into the treasury of the company.

The formal statement that the company would not undertake to deliver the message, if made, must go for nothing in the face of the undisputed facts which show that it did in reality, and according to its custom, undertake and agree by its Gordonsville agent to do it.

SEAUER v. BRADLEY.

SUPREME COURT OF MASSACHUSETTS, 1901.

[179 Mass. 329.]

TORT under Pub. Sts. c. 73, § 6, to recover for the loss of life of the plaintiff's intestate by reason of the negligence of the defendant, alleged to be a common carrier of passengers, operating a passenger elevator in the building owned and managed by him as trustee numbered 171 A on Tremont Street in Boston. Writ dated December 7, 1898.

HOLMES, C. J. Those who maintain a passenger elevator in an office building are not "common carriers of passengers" within the meaning of Pub. Sts. c. 73, § 6. We assume that that section is not prevented from applying because it represents a statute passed before such elevators were in familiar use. But the words do not describe the owners of

an elevator. The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from that consideration, manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let.

The only question before us is the meaning of words. Therefore decisions that the liability of people in the defendant's position is not less than that of railroad companies do not go far enough to make out the plaintiff's case.

Exceptions overruled.

NOLTON v. WESTERN RAILROAD CORPORATION.

COURT OF APPEALS, NEW YORK, 1857.

[15 N. Y. 444.]

DEMURRER TO COMPLAINT. The complaint stated that the plaintiff was a mail agent on the defendant's railroad, in the employment of the United States, and the defendant a carrier of passengers and freight, for fare and reward, by railroad and cars, between Greenbush and Boston. That defendant was bound by contract between it and the United States, for a stipulated time and price, to carry the mails, and also the mail agent, without further charge; that in pursuance and in consideration of such contract, the defendant received the plaintiff into a car fitted up for the accommodation of the mail and mail agent; and the plaintiff, for the consideration aforesaid, became and was a passenger in the said cars, to be by the defendant, thereby, safely and with due care and skill, carried and conveyed to Worcester, which the defendant then and there undertook and was bound to do. It then states a bodily injury received by the plaintiff, by the running of the car, containing the plaintiff, off the track, and breaking it, through defectiveness of machinery, want of care, skill, &c. The defendant demurred, and after final judgment for the plaintiff, by the Supreme Court at gen-

eral term, appealed to this court. The case was submitted on printed briefs.

SELDEN, J. As the only objection which can be taken to the complaint upon this demurrer is, that it does not contain facts sufficient to constitute a cause of action, it is entirely immaterial whether the action be considered as in form *ex contractu* or *ex delicto*. The only question is, whether upon the facts stated, the plaintiff can maintain an action in any form.

The plaintiff cannot, I think, avail himself of the contract between the defendant and the government, so as to make that the gravamen of his complaint, and the foundation of a recovery. This is not like the cases in which a third person has been permitted to recover upon a contract made by another party for his own benefit. The distinction between them is plain. Those were cases where the defendant, for a consideration, received from the party to the contract, had undertaken to do something ostensibly and avowedly, for the direct benefit of the plaintiff, and when the advantage to the latter was one object of the agreement. Here the parties had no such intention. In contracting for the transportation of the mail agent, the parties had no more in view any benefit or advantage to him, than if the contract had been to transport a chattel. The government took care of the public interests, and left those of the mail agent to such protection as the law would afford.

Another distinction is, that in the cases referred to, the party claiming the benefit of the contract, and seeking to enforce it, was one who was specifically mentioned and pointed out in the contract itself, while here no one is designated; and to entitle the plaintiff to recover upon it, it must be regarded as a shifting contract, which can be made to enure to the benefit of any person who may temporarily assume the duties of mail agent. I think there is no precedent for such a construction of such a contract.

If, then, the plaintiff can recover at all, it must be upon the ground of some implied contract, or of some legal obligation or duty resting upon the defendants, to exercise proper care and skill in the transportation of passengers; and the question is, whether, under the circumstances of this case, such a contract is implied, or such a duty imposed for the benefit of the plaintiff.

It would seem a startling proposition, that in all those cases where persons travel upon railroads engaged not in their own business, but that of others, and where their fare is paid by their employer, they are entirely at the merey of the railroad agents, and without redress, if injured through their recklessness and want of care and skill. If, however, railroad companies are liable, in cases like the present, it is important to ascertain the precise nature and extent of that liability.

In the first place, then, it is clear that they are not liable, by virtue of that custom or rule of the common law, which imposes special and peculiar obligations upon common carriers. Persons engaged in the

conveyance of passengers, are not common carriers, within the meaning of that rule, which applies solely to those whose business it is to transport goods. (Bac. Abr., tit. Carriers ; 2 Kent's Com., § 40 ; Story on Bail., § 498, and note.)

If the complaint in this case, after stating that the defendant was a carrier of passengers and freight from Greenbush to Boston, for hire and reward, had simply averred that the plaintiff became a passenger in the cars of the defendant, and was so received by it ; an implied contract would have arisen on the part of the defendant, to transport the plaintiff with all due diligence and skill ; because the law would have inferred from those facts, that the defendant was to receive a compensation from the plaintiff himself. But this inference is repelled by the contract set forth, and the statement that the plaintiff was received as a passenger under it.

It was suggested by the plaintiff's counsel, upon the argument, that a contract might be implied, of which the agreement between the defendant and the government should form the consideration and basis. But although that agreement may be resorted to, for the purpose of showing that the plaintiff became a passenger upon the cars by the consent of the defendant, and not as a mere intruder, it cannot, I think, be made available by the plaintiff, as the consideration of an implied assumpsit. As to him, that agreement is *res inter alios acta*. He is not a party to it, or mentioned in it. His employment by the government may have taken place long after the agreement was made, and have had no reference to it. If any contract can be implied from that agreement, in favor of the plaintiff, it must be a contract to transport him from place to place, according to the terms of the agreement. Suppose, then, the cause of action, instead of being for an injury received through the negligence of the defendant, had been for not furnishing the necessary cars, or not running any train, could the plaintiff recover in such an action ? Would the defendant be liable for its failure to perform the contract, not only to the party with whom the contract was made, and from whom the consideration was received, but to a third party not named in it, and from whom they had received nothing ? No one would claim this.

It may be said that the implied contract with the plaintiff, is limited to an undertaking to transport safely or with due care. It is difficult to see, however, how there can be a contract to transport safely where there is no contract to transport at all. My conclusion therefore is, that this action cannot be maintained upon the basis of a contract express or implied.

It necessarily follows, that it must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject, is that of *Coggs v. Bernard* (Ld. Ray, 909). There the defendant had undertaken to take several

hogsheads of brandy belonging to the plaintiff, from one cellar in London, and to deposit them in another; and in the process of moving, one of the hogsheads was staved and the brandy lost, through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive anything for his services, he was, nevertheless, held liable by the whole court.

The principle of this case has never since been doubted, but there has been some confusion in the subsequent cases as to the true nature of the obligation, and as to the form of the remedy for its violation. In many instances suits have been brought, upon the supposition that an implied contract arises, in all such cases, that the party will exercise due care and diligence; and the language of Lord Holt, in *Coggs v. Bernard*, undoubtedly gives countenance to this idea. He seems to treat the trust and confidence reposed, as a sufficient consideration to support a promise. This doctrine, however, can hardly be considered as in consonance with the general principles of the common law. In addition to the difficulty of bringing mere trust and confidence within any legal definition of valuable consideration, there is a manifest incongruity in raising a contract, to do with care and skill, that which the party is under no legal obligation to do at all.

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially, in its nature, from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury; or upon one who digs a ditch for some lawful purpose in a highway, and carelessly leaves it uncovered at night, to the injury of some traveller upon the road. It is true, it may be said that, in these cases, the duty is to the public, while in the present case, if it exists at all, it is to the individual; but the basis of the liability is the same in both cases, viz., the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence, where there was no legal obligation to use care, as where a man digs a pit upon his own land, and carelessly leaves it open, affords no ground of action. But where there is anything in the circumstances to create a duty, either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property, and a similar undertaking to transport a person. If either are injured through the culpable carelessness of the carrier, he is liable. If, according to the case of *Coggs v. Bernard* (*supra*), and the subsequent cases, an obligation to exercise care arises in one case, it must also in the other.

It is true that, according to the authorities, the party in such cases is only liable for gross negligence. But what will amount to gross negli-

gence depends upon the special circumstances of each case. It has been held that, when the condition of the party charged is such as to imply peculiar knowledge and skill, the omission to exercise such skill is equivalent to gross negligence. Thus, it was said by Lord LOUGHBOROUGH, in *Shiells v. Blackburne* (1 Hen. Bl., 158), that "if a man *gratuitously* undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

The same doctrine is advanced by PARKE, B., in *Wilson v. Brett* (11 Mees. & Wels., 113). He says: "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

I regard this principle as peculiarly applicable to railroad companies, in view of the magnitude of the interests which depend upon the skill of their agents, and of the utter powerlessness of those who trust to that skill to provide for their own security.

This case is not like that of *Winterbottom v. Wright* (10 Mees. & Wels., 109). There the defendant had not undertaken to transport the plaintiff, either gratuitously or otherwise. He was simply bound by contract with the government to furnish and keep in repair the carriages used by the latter in transporting the mails. The relations of the parties in that case and in this are very different, and the cases cannot be considered as governed by the same principles.

I entertain no doubt that in all cases where a railroad company voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, in the absence, at least, of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, the latter is liable. The matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question, however, does not arise here. Degrees of negligence are matters of proof, and not of averment. The allegations of negligence in this complaint are sufficient, whether the defendant is liable for ordinary or only for gross negligence.

The judgment should be affirmed.

BROWN, J., also delivered an opinion for affirmance.

All the judges concurring.

Judgment affirmed.

MARSHALL v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY CO.

COMMON BENCH, 1851.

[11 C. B. 655.]

THIS was an action upon the case brought by the plaintiff to recover from the defendants, the York, Newcastle, and Berwick Railway

Company, damages for the loss of a portmanteau containing articles of wearing apparel.¹

The cause was tried before Jervis, C. J., at the sittings at Westminster after the last term. It appeared that the plaintiff was valet to Lord Adolphus Vane, that, in the month of September, 1850, he was travelling to London with his master, that the portmanteau in question was placed in the railway train at Darlington, and lost on the road. It appearing, however, upon the evidence of Lord Adolphus Vane, that his lordship had himself taken and paid for the tickets for himself and his servant, it was submitted, on the part of the defendants, that, the action being founded upon contract, and the contract having been made with the master, the master and not the servant should have sued.

The Lord Chief Justice nonsuited the plaintiff, reserving to him leave to move to enter a verdict for £30, — the agreed value of the portmanteau and its contents, — if the court should be of opinion that the action was well brought.

JERVIS, C. J. I am of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the damages agreed upon at the trial. Three points have been incidentally made in the course of the argument. In the first place, it is said, that, under the circumstances of this case, no action will lie by the plaintiff against these defendants, whatever the form of the declaration. But the admissions made in the course of the argument, and the authorities cited, place the defendants in a difficulty; for, it is conceded, — and indeed the concession could not have been avoided, — that, if, under the same circumstances, the plaintiff had sustained the loss of a limb, or any other personal injury, he alone could have sued. It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, though he might in respect of the loss of service. But, upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage. The breach of duty is the same in the one case as in the other. The action therefore will lie, if the cause of action be properly alleged in the declaration. But it has been contended, on the part of the defendants, that the form of the declaration in this case so ties up the plaintiff, and restricts the liability of the defendants, that this action cannot be maintained; because the declaration alleges that the defendants received the plaintiff and his luggage to be carried for reward to them in that behalf, — which means, according to the authorities, to be paid by the plaintiff. To that argument, there are two answers. In the first place,

¹ The pleadings, arguments of counsel, and the concurring opinion of WILLIAMS, J are omitted. — *ED.*

there is no denial on the record; for, a traverse *modo et forma* substantially denies merely the allegation traversed; and therefore the traverse of the receipt of the plaintiff and his luggage, to be carried for hire and reward, by the defendants, did not put in issue by whom the reward was to be paid. And, further, if that were put in issue, the words of the allegation must be construed with reference to the rest of the declaration. If payment by the plaintiff be necessary, the general allegation that the defendants undertook to carry the plaintiff and his luggage for hire and reward, will be understood to mean, to be paid by the plaintiff. But, if the liability of the defendants arises, not from the contract, but from a duty, it is perfectly unimportant by whom the reward is to be paid; for, the duty would equally arise, though the payment was by a stranger. I therefore think, that, upon the proper construction of the declaration, the objection does not arise. It becomes unnecessary to advert to the point suggested by Mr. Willes, that the payment by the master on the servant's behalf was a payment by the servant sufficient to sustain the averment, even construing it as it was contended on the part of the defendants it ought to be construed. The rule must be absolute.

CARROLL v. STATEN ISLAND RAILROAD CO.

COURT OF APPEALS, NEW YORK 1874.

[58 N. Y. 126.]

ANDREWS, J. This action is brought to recover damages for injuries sustained by the plaintiff in consequence of the explosion of the boiler of the ferry-boat Westfield, plying between the city of New York and Staten Island, while lying at the dock in the city of New York, on Sunday, July 30, 1871. The Westfield was engaged on that day in making regular trips between New York and Staten Island, for the carriage of passengers; and the running of ferry-boats on Sunday was a part of the regular business of the defendant.

The plaintiff went upon the Westfield shortly after one o'clock of the day mentioned, with the design of going to Staten Island, for the purpose, as the referee finds, of innocent recreation and the enjoyment of the sea air. He paid the usual fare on entering the boat, and soon after, and within a few minutes of the time when the boat was to leave the dock, the boiler exploded. Several of the passengers were killed, and many others, including the plaintiff, were injured.

The point was taken on the trial, and is urged on this appeal, that the plaintiff cannot maintain this action, for the reason that he was, at the time of the injury, engaged in an unlawful act, viz., travelling on Sunday, in violation of the statute which prohibits travel on that day unless in certain excepted cases, and under a contract with the defendant which was illegal, in that it related to the unlawful act of the

plaintiff, and was entered into by him as a means of enabling him to transgress the law. Such a contract, it is said, the law will not enforce, and the defendant incurred no obligation, and owed no duty by reason of it to the plaintiff, upon which he can found a right of action. The objection to the recovery here stated assumes and admits that the explosion of the boiler was attributable to the negligence of the defendant; and it also assumes that the plaintiff's right of action has its essential basis in the contract between the parties, created by the payment of fare on the one side, and the undertaking to carry on the other. It must be admitted, I think, that the plaintiff was travelling in violation of the statute. He left the hotel where he was stopping, for the purpose of going to Staten Island, and in the course of the journey took passage in the Westfield. He was not going in a case of necessity or charity, or for any purpose within the exceptions of the statute. He was travelling within the general meaning of the word, and certainly within its meaning as is used in the Sunday law. The plaintiff, therefore, was violating the law. But the defendant had a right to carry him, and to enforce the payment of the usual compensation, if payment was refused, notwithstanding the illegal purpose of the plaintiff in going, if it was unknown to the defendant. This, I think, results necessarily from the character of the defendant's business. It exercises a franchise granted by the State to maintain and operate a ferry between New York and Staten Island. It is not prohibited by its charter from running it on Sunday. Indeed, the public convenience requires that ferries between cities, or places densely populated, separated by rivers or narrow water channels, should be run on Sunday. The statute authorizes travel on that day in cases of necessity and charity, and in going to and from church, and for other purposes; and for these permitted purposes large numbers of people travel on Sunday. Contracts to carry persons who are permitted to travel must be valid. The proprietors of ferries cannot know the purpose of those who seek conveyance on Sunday, and it would be impracticable to require that they should ascertain it before receiving persons as passengers. The defendant, therefore, is entitled to demand compensation for the carriage of passengers on Sunday, although, in fact, they may be travelling illegally. There is no evidence that the defendant, when it received the plaintiff as a passenger, knew that he was travelling in violation of law.

The contract between the parties was not in a broad or general sense illegal or void. It is one the defendant had a right to make and to enforce against the plaintiff. Can the defendant, under such circumstances, having entered into a contract which he might lawfully make, escape from liability for a negligent performance on the ground that the motive and purpose of the other party in making it were unlawful? May he take the benefit of the contract and be exempted from its responsibilities? Does this case constitute an exception to the rule that the obligation of a contract must be mutual; and may one party resist performance and at the same time exact it from the other?

But we deem it unnecessary to decide the question, which was argued with great ability by counsel, touching the liability of the defendant in the action, treating it as founded upon the contract between the parties. The gravamen of the action is, the breach of the duty imposed by law upon the carrier of passengers, to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. In *Bretherton v. Wood* (3 Brod. & Bing. 54), which was an action brought against ten defendants, as proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligent driving, the jury found a verdict against eight of the defendants, and in favor of the other two. On error, the judgment was affirmed, and Dallas, C. J., said: "If it were true that the present action is founded on contract, so that to support it a contract must have been proved, the objection would deserve consideration. But we are of opinion that the action is not so founded, and that on the trial it could not have been necessary to show that there was any contract; and, therefore, that the objection fails. The action is on the case, against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to convey and carry their goods and passengers safely and securely, so that by their negligence or fault no injury happens. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." And in *Philadelphia and Reading R. R. Co. v. Derby* (14 How. [U. S.] 483) Grier, J., speaking of the duty of a common carrier, says: "This duty does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous." (See, also, *Allen v. Sewall*, 2 Wend. 338; *Bank of Orange v. Brown*, 3 id. 158; *Steamboat v. King*, 16 How. [U. S.] 474; *Nolton v. Western R. R.*, 15 N. Y. 444; *Gillenwater v. Mad. and In. R. R. Co.*, 5 Ind. 339; *Farwell v. Boston R. R.*, 4 Met. 49; *Redfield on Railways*, 210; *Pierce Am. R. R. Law*, 477.)

The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract.

This case, therefore, is not within the principle of many of the cases cited, which forbid a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the

proof of an illegal contract to support it. (*Northrup v. Foot*, 14 Wend. 248; *Watts v. VanNess*, 1 Hill, 76; *Smith v. Wilcox*, 24 N. Y. 353.)

The relation of carrier and passenger existed between the parties. The plaintiff went upon the Westfield to be carried to Staten Island, and the defendant received him on the boat for that purpose. That this relation was entered into, the payment and receipt of fare is unequivocal evidence. It is a distinct question, whether the law will enforce the general obligations of the carrier to the same extent, in this case, as though the injury to the plaintiff had happened on some day other than Sunday.¹

¹ The Court decided that recovery could be had, notwithstanding the plaintiff was travelling on Sunday. — Ed.

CHAPTER III.

BEGINNING OF THE UNDERTAKING.

BULKLEY v. NAUMKEAG STEAM COTTON CO.

SUPREME COURT OF THE UNITED STATES, 1860.

[24 *Howard*, 386.]

NELSON, J. This is an appeal from a decree of the Circuit Court of the United States, sitting in admiralty, for the district of Massachusetts.

The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the District and Circuit Courts, and upon which both courts decreed for the libellant.

From this agreed state of facts, it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libellant 707 bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading.

The condition of the bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case.

Vessels of a large size, and drawing over a given depth of water, cannot pass the bar in the bay, which is situate a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass the bar in ballast, go up to the city and take on board as much of their cargo as is practicable, and, at the same time, allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board.

In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker, through whom the freight is engaged, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it, and gives his own receipt for the same. On delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge.

The usual bills of lading are subsequently signed by the master and delivered.

In the present case, the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and 100 bales were laden on board of her at the city to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the 100 bales was taken out, her boiler exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the 607 bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker, at Mobile, for account of whom it may concern; two were lost.

The master of the barque signed bills of lading, including the 100 bales, being advised that he was bound to do so, and that if he refused, his vessel would be arrested and detained. On her arrival at Boston, the master delivered the 607 bales to the consignees, and tendered the fourteen, which were refused.

A question has been made on the argument, whether or not the libellant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

The court is of opinion that the vessel was bound for the safe shipment of the whole of the 707 bales of cotton, the quantity contracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed — the one entitled to all the privileges secured to the owner of the cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognized by principles and usages of the maritime law.

The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the delivery and acceptance at the place of shipment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

The contract as thus explained being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow, upon the settled principles of admiralty law, which binds the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.¹

THE R. G. WINSLOW.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF
WISCONSIN, 1860.

[4 *Biss.* 13.]

THIS was a libel filed by Daniel Newhall against the bark R. G. Winslow for the loss of seven hundred bushels of wheat while being discharged from a warehouse into the vessel. The loading commenced about twelve o'clock on the morning of the third of October, 1859, the wheat being weighed by the shipper, in the cupola of the warehouse, in one hundred bushel drafts, which were tallied by the first mate, there present. It was then passed from the warehouse to the vessel through a pipe of heavy boiler wrought iron. The pipe was about sixteen feet long, and ten inches in diameter. The warehouseman fastened one end of the pipe to the warehouse, and placed the other on the deck of the vessel, to be regulated, watched and shifted by the second mate. After the delivery of about five thousand bushels of the wheat the vessel careened, and the pipe parted. In consequence of this accident, about seven hundred bushels of wheat went, partly on the deck of the vessel, and partly on the dock, and were lost in the river. Both the master and the second mate were asleep below at the time of the accident.

MILLER, J. If the mate who had charge of the pipe had been vigilant in watching the discharge of wheat from the pipe, but a small quantity of one draft would have been lost, for by a word from him to the persons in the cupola, the flow of wheat could have been instantly shut off; and it was his duty to give the order.

I do not think it material to inquire how much the vessel careened, or whether the pipe broke or parted at the joint, or whether the careening of the vessel caused the parting of the pipe, or whether the parting

¹ The remainder of the opinion, discussing another point, is omitted. See *The Keokuk*, 9 Wall. 517. — ED.

of the pipe was at a place over the deck of the vessel or over the dock. The mate on board, who had charge of the pipe, and of the discharge of the wheat from the pipe into the hold of the vessel, neglected his duty, and allowed seven drafts of one hundred bushels of wheat to be lost. In respect to the loading and carriage of the goods, the master is chargeable with the most exact diligence. His responsibility with respect to them begins where that of the wharfinger ends, and when they are delivered to some accredited person on board the ship. If he receives them at the quay, or beach, or sends his boat for them, his responsibility attaches from the moment of the receipt. Not only is the master responsible with respect to the safety and security of the goods, but the vessel is also liable. It stands as the shipper's security, and is, by the maritime law, hypothecated to him for his indemnity. The duties of the master as carrier extend to all that relates to the loading, transportation, and delivery of the goods. And for the faithful performance of those duties the ship stands pledged, as well as the master and the owners personally. And the manner of taking goods on board, and the commencement of the master's duty in this respect, depends on the custom of the particular place. More or less is to be done by the wharfingers or lightermen, according to the usage. The master of the vessel knew that the wheat was to be delivered on board through the pipe; and he also knew the manner of weighing and discharging the grain from the hopper, when he made the contract; and with knowledge he had the first mate placed in the cupola, to tally the drafts, and the second mate stationed on deck to watch the discharge of the wheat from the pipe into the hold of the vessel, and to keep the vessel trimmed; and the work had commenced before he turned in. It is not the business of the officer in charge of the receiving of wheat from a warehouse through a pipe, to permit any person not belonging to the vessel, nor under his command, on board, to shift the pipe, or to trim the vessel. This is as much the business of the vessel, as weighing the wheat is of the warehouseman. The parties proceeded to put the wheat on board, according to the usual manner of loading vessels with grain from warehouses.

The pipe is attached to the warehouse, and it is used jointly by the warehouse and the vessel. The vessel controls the discharge of the wheat from the warehouse through the pipe. The order to discharge or to stop, is given from the vessel; and the wheat is weighed by the warehouseman, and the drafts are tallied by the first mate before discharged from the hopper. Using the pipe in loading the vessel was necessary, in the performance of the contract made by the master with the shipper, for which the owners were to receive compensation in the freight earned by the vessel. Unless the wheat was transported, freight would not be earned; and it could not be transported unless a pipe was used in its delivery on board. The master might have supplied a pipe; and with the consent of the owner of the warehouse, he might have attached it to the warehouse and used it. But there can be

no difference in law, whether he used the pipe of the warehouse or his own pipe. He had the sole control of the warehouse pipe, and made it the pipe of the vessel *pro hac vice*. I am satisfied that the duty of the warehouseman ended with the tally of the drafts by the mate, and the discharge of the wheat from the warehouse into the outside pipe, and that the duty of the master then commenced. At that moment the delivery of the wheat was complete, and the liability of the vessel attached. The shipper had then fully parted with the possession; and having no longer any control, or right of control, over the wheat, he was in no degree responsible for its actual delivery on board. Upon the same principle it was ruled, in the case of the Bark Edwin, 23 Law Reporter, 198, that the vessel was liable for the non-delivery of bales of cotton according to contract, which were lost before reaching the vessel, in consequence of the explosion of the boiler of a lighter, in which the cotton was being carried from the cotton press to the vessel, in the possession of the master of the vessel.

This case is different from a contract merely executory, where there has been no delivery of the goods to the master, nor change of possession, nor effort to deliver. When there is no delivery of the goods, the contract of the master for their transportation creates no lien. *Buckingham v. The Schooner Freeman*, 18 Howard, 182. There the bill of lading of goods not shipped was designed as an instrument of fraud. And in *Vandewater v. Mills*, 19 Howard, 82, where there was a contract for the future employment of the vessel. And in *Hannah v. The Schooner Carrington*, 2 Law Monthly, 456, where the ship was withdrawn from the trade, and refused further to comply with a contract of affreightment. And in *The Joseph Grant*, it was decided that the master has no authority as such to sign a bill of lading in blank, and that the libellant as assignee of the bill of lading, filled up after the vessel sailed, acquired no lien on the vessel. The cargo on board at the time corresponded with the bill of lading as filled up, but it was delivered to a different consignee, according to the bill of lading correctly given by the master before the vessel sailed.

The cases here referred to are wanting in the essential particular of delivery to the vessel, to make them precedents governing the case under consideration. The wheat lost by the negligence of the mate was delivered to the vessel as a portion of the twenty thousand bushels contracted to be received on board and transported to Buffalo; and the libellant should have a decree for its value.

MERRITT v. OLD COLONY AND NEWPORT RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1865.

[11 Allen 80.]

TORT against a railroad corporation to recover for damages done to a caloric engine sent by the plaintiff to the depot of the defendants

in South Boston for transportation to South Abington, while being loaded upon the cars.

At the trial in the superior court, before *Morton, J.*, the plaintiff introduced evidence tending to show that the engine was carried by a truckman, and upon its reaching the depot the train for the day had gone, and the laborers at the depot had gone to dinner; that he notified the defendants' freight agent that he had come to deliver the engine, which was on a sled, and the agent replied that the men had gone to dinner and directed him to drive near a derrick, by a certain track, at which place heavy articles were loaded upon the cars, and there wait till the return of the men, who would run a car there and put the engine on board; that he did so, and when the men returned they ran a car there and commenced loading the engine, the agent of the defendants superintending and directing the work; that they put a chain round the engine and commenced hoisting, when the chain slipped; that they put it round again and the truckman tied it on with a rope so as to prevent its slipping, and they hoisted it again, when the engine swung heavily against the car, breaking it badly; that the boom of the derrick was not over the sled, and the derrick could not be worked properly, because it was frozen at the bottom. The derrick and chain belonged to the defendants.¹

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

DEWEY, J. The instructions given were correct, and sufficiently full to guide the jury as to their verdict.

The plaintiff introduced evidence tending to show that the engine was carried by a truckman to the freight station of the defendants, to be transported to South Abington; that notice of its arrival was given to the freight agent, who directed the truckman to drive near a derrick by a certain track at which heavy articles were laden upon the cars, and there wait till the men came, when they would run in a car and put it on board; that the truckman followed this order, and the men came, run in a car, and commenced loading the engine, the agent of the defendants superintending and directing the work, and the truckman being present also, giving assistance to prevent the chain which had been placed around the engine from slipping. The mode of placing the engine upon the cars by means of a derrick was an arrangement of the defendants, and they provided the derrick for that purpose.

The evidence on the part of the defendants, as to the superintendence and control of the operation of removing the engine from the sled of the truckman to the cars, conflicted with that of the plaintiff; and this was submitted to the jury. It became necessary to ascertain at what point, as respects the rights of the bailor, the truckman's responsibility for the safe transportation of the engine ceased, and

¹ The effect of the defendants' evidence and the instructions of the court are omitted.
— ED.

when the same was cast upon the defendants. The court properly ruled that it was when the engine was delivered to and accepted by them for the purpose of transportation, and that in order to constitute such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine for the purpose of transportation. Story on Bailm. § 453.

Of course in deciding the question when the custody does thus attach, much will depend upon the manner in which they receive goods for transportation, the provision they make for raising heavy articles into their cars, and the active participation of the agent of the company in reference to the same.

As to warehousemen, it has been held that as soon as the goods arrive and the crane of the warehouse is applied to them to raise them into the warehouse, the liability of the warehouseman commences, and it is no defence that they are afterwards injured by falling into the street from the breaking of the tackle. Story on Bailm. § 445.

In the opinion of the court, the instructions were sufficiently full, and the further instructions asked were properly refused.¹

Exceptions overruled.

MERRIAM *v.* HARTFORD AND NEW-HAVEN RAILROAD.

SUPREME COURT OF ERRORS, CONNECTICUT, 1850.

[20 Conn. 354.]

STORRS, J.² The plaintiff claimed to have proved, on the trial, that the property, to recover the value of which this action was brought, was delivered by him, to be transported by the defendants, as common carriers, from the city of New York to Meriden, on a dock in said city, which was the private dock of the defendants, and in their exclusive use, for the purpose of receiving property to be transported by them; and that it was delivered there, in the usual and accustomed manner in which the defendants received property for transportation; and the court charged the jury, that such delivery at said dock, was a good delivery to the defendants, to render them liable for the loss of the property, although neither they nor their agents were otherwise notified of such delivery. The defendants insist, that they were not chargeable for it, unless they had express or actual notice of such delivery; and that the jury should have been so instructed.

A contract with a common carrier for the transportation of property, being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be either actual or constructive. The general

¹ See *Thomas v. Day*, 4 Esp. 262. — ED.

² Only so much of the opinion as discusses the question of delivery is given. — ED.

rule is, that it must be delivered into the hands of the carrier himself, or of his servant, or some person authorized by him to receive it; and if it is merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or is placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there would be no bailment or delivery of the property, and he, consequently, could not be made responsible for its loss. Addison on Cont. 809. But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If therefore, they agree that the property may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case, the defendants had not agreed to dispense with express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case, sufficient to show a public offer, by the defendants, to receive property for that purpose, in that mode; and that the delivery of it there accordingly, by the plaintiff, in pursuance of such offer, should be deemed a compliance with it on his part; and so to constitute an agreement between the parties, by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any further notice. Such practice and usage were tantamount to an open declaration, a public advertisement by the defendants, that such delivery should, of itself, be deemed an acceptance of it by them, for the purpose of transportation; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice, and the most palpable fraud.

The present case is precisely analogous to that of the deposit of a letter for transportation in the letter-box of a post office, or foreign packet vessel, and to that of a deposit of articles for carriage in the public box provided for that purpose, in one of our express offices; where it would surely not be claimed, that such a delivery would not be complete, without actual notice thereof to the head of these establishments or their agents.

The only authorities cited by the defendants, to show that an express notice to them was necessary in this case, are *Buckman v. Levi*, 3 Campb. 414, and *Packard v. Getman*, 6 Cowen, 757. These cases are

distinguishable from the present, in this respect, that there was not, in either of them, a claim of any particular habit or usage of the defendant, which should vary or modify the general principles of law in regard to the mode of delivering the property. They were, therefore, decided merely on those general principles, unaffected by any special agreement between the parties on that subject, inferable from such usage. But in several of the cases cited, it was held, that where the carrier had been in the habit of receiving property for transportation in particular mode, a delivery to him in that mode, was sufficient.

GEORGIA SOUTHERN RAILWAY v. MARCHMAN.

SUPREME COURT, GEORGIA, 1904.

[121 Ga. 235.]

COBB, J.¹ . . . 2, 3. Complaint is made that the court erred in not granting a nonsuit. The evidence authorized the jury to find that while at the mile-post referred to in the petition there was no depot, station, platform, or agent, the company was accustomed to receive freight on a spur-track at that point; that, by an agreement made between the plaintiff and the master of trains of the defendant company, cars were to be placed on the spur-track at a given time for the purpose of receiving and transporting the seed; that at the time fixed plaintiff carried to the spur-track a portion of the seed to be transported; that, finding no cars there, he notified the trainmaster that he had transported a portion of the seed and was ready to carry the balance, and asked when the cars would be placed there; that he was informed that the cars would be placed there the next day, and instructed to continue to carry the seed to the place agreed upon; that, in compliance with this direction, the plaintiff continued to haul the seed to this place, and, no cars being there into which they could be loaded, the seed were placed upon the ground at the most convenient and suitable place that the locality afforded for the purpose for which they had been carried to that point; that there were no cars sent there for several days, and before any were sent and the seed loaded into them rain fell upon the seed and damaged them. If the master of trains was authorized to make this contract in behalf of the company, a finding in favor of the plaintiff for whatever damage he sustained as a result of the rain upon the seed was authorized. The master of trains testified that he had no authority to make a contract of affreightment, but that he did have authority to make contracts for the placing of cars along the line for the reception of freight. He therefore had a right to make the contract which the plaintiff relies upon; and the question arises,

¹ Only so much of the opinion as discusses the question of delivery to the carrier is given. — ED.

whether the damage resulting to the plaintiff from the seed becoming wet between the time the cars ought to have been placed at the point agreed on and the time they were actually placed there was the result of a breach of the contract made with the plaintiff. While the master of trains did not have authority to make a contract of affreightment, he did have authority to make an agreement to receive freight on board of cars at different points on the line of railroad, preliminary to a contract of carriage being made by some other agent of the railroad company, and this conferred upon him authority to receive freight for the purpose of transportation, although he had no authority to make a contract of transportation itself. When he agreed with the plaintiff to place cars upon the spur-track at the mile-post referred to, he agreed, in behalf of the company, to receive the freight at that point on board of cars. When the plaintiff came to this place with the cottonseed, and notified the master of trains that no cars were there, and was instructed by him to continue to haul the seed, this was in effect an agreement to receive the seed alongside the track to await cars that would be sent there to receive them. A railroad company is not generally bound to receive freight except at its stations; but it may by custom bind itself to receive it at other points, and certainly it may do this by express contract. See *Fleming v. Hammond*, 19 Ga. 145. Parties having freight to be transported by rail can not make a good delivery to the railway company by simply depositing the goods along the line anywhere and everywhere. *Central R. Co. v. Hines*, 19 Ga. 209. But where by agreement freight is deposited at a given point on the line of railway for the purpose of immediate transportation, there seems to be no good reason why such deposit should not constitute delivery to the carrier, whose liability would commence from the time the goods were deposited at the place agreed on. See *Wilson v. Railway Co.*, 82 Ga. 388 *et seq.*; *Southern Express Company v. Newby*, 36 Ga. 635. There was no error in overruling the motion for a nonsuit.

GROSVENOR *v.* NEW YORK CENTRAL RAILROAD.

COURT OF APPEALS, NEW YORK, 1868.

[39 N. Y. 34.]

MILLER, J. I am of the opinion that the court erred in refusing to nonsuit the plaintiff upon the trial. To render a party liable as a common carrier, it must be established that the property was actually delivered to the common carrier or to some person duly authorized to act on his behalf. The responsibility of the carrier does not commence until the delivery is completed. *Angell on Carriers*, § 129; *Story on Bailments*, § 532. It is not enough that the property is delivered

upon the premises, unless the delivery is accompanied by notice to the proper person. Paekard v. Getman, 6 Cow. 757; Trevor v. U. & S. R. R. Co., 7 Hill, 47; Blaneard v. Isaacs, 3 Barb. 388; 2 Kent Com. 604; 1 Pars. on Con. 654. The liability of the carrier attaches only from the time of the acceptance of the goods by him. Story on Bailments, § 533; 6 Cow., *supra*. To complete the delivery of the property within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent. It appears in the case at bar that the cutter of the plaintiff was placed upon the platform of the defendant's freight-house, by a servant of the plaintiff, the freight having been previously paid, to be transported to Buffalo. At the time when it was thus left, a baggageman in the defendant's employment, who was then engaged in sweeping out the depot, was notified that there was some freight to go to Buffalo in the noon train. The servant of the plaintiff testifies that he had seen this person receive and put freight on the cars, and at this time he apparently had charge of the depot, although the proof on the part of the defendant shows that another employee was the real freight agent, and the person with whom the contract was made for the carriage of the property, and that the baggageman had no authority to receive it. Upon this state of facts, I am inclined to think that the plaintiff had established sufficient *prima facie* to submit to the jury the question whether the baggageman was authorized to receive the property, and whether the notice to him was of itself sufficient. Persons dealing with railroad corporations, and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it, have ample authority to deal with them. It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation, and even although it subsequently appears that another employee was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility, by repudiating their acts. So far then as this branch of the case is concerned, it was at least a question of fact, to be submitted to the jury under proper instructions, whether the baggageman of the defendant, to whom it is claimed by the plaintiff the cutter was delivered, was the agent of the defendant, duly authorized to receive the same, and whether notice of its delivery was given to him as such agent. But, whether he was such agent, or the duty of receiving freight devolved upon another person, the defendant could not be held liable under any circumstances, without an actual and complete delivery of the property into the possession of the corporation, and under its control. This, I

think, was not done. The undisputed testimony shows, that the cutter was placed upon the platform, and that within two or three hours afterward, it was carried away and broken to pieces by a passing train of cars. The fact that it was thus carried away, evinces, that it was carelessly exposed by the plaintiff's servant; that the destruction of the cutter was occasioned by his negligence, and that the delivery was not as perfect and complete as it should have been.

The accident would not have happened had the cutter been placed beyond the reach of passing trains. It was not enough that the agent was notified, to make out a valid acceptance and delivery. The place of delivery was important, and it was equally essential that due care should be exercised. Suppose the servant had left the cutter on the track of the railroad, and notified the agent, would the defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises, no surrender of the property into the possession of the agent. Until it was actually delivered, the agent was under no obligation to take charge of the property, even if notified. It is apparent that the plaintiff was in fault in not delivering the property to the defendant, and in leaving it in an exposed condition, which caused its destruction; and, having failed to establish this material part of his case, should have been nonsuited. As a new trial must be granted for the error stated, it is not important to examine the other questions raised and discussed.

Judgment reversed, and new trial granted, with costs to abide the event.¹

WATTS v. BOSTON AND LOWELL RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1871.

[106 *Mass.* 466.]

CONTRACT against the Boston & Lowell and Nashua & Lowell Railroad Corporations, as common carriers, to recover the value of 900 corn-planters, delivered to them by the plaintiff at Amherst in New Hampshire for transportation to Boston, and destroyed by fire in their freight depot at Amherst before the transportation was begun. Trial in the Superior Court, before *Reed, J.*, who allowed the following bill of exceptions:

"The defendants contended, and there was evidence tending to show, that the corn-planters were part of a lot of 1000, which the plaintiff was in the act of delivering, and that they were detained at the depot to await the arrival of the remainder of the lot, for the plaintiff's convenience, and therefore that the defendants were only subject to the liability of warehousemen and not of common carriers. The plaintiff's evidence tended to show authority and direction from the

¹ See *Lennon v. R. R.*, 127 Ia. 432. — Ed.

plaintiff to forward the corn-planters as delivered. The judge instructed the jury (among other instructions not objected to) that, if the defendants had either such authority or direction to forward the corn-planters as delivered, they were liable." The jury found for the plaintiff, and the defendants alleged exceptions to this instruction.

CHAPMAN, C. J. The freight depots of railroad corporations are commonly used for a double purpose. One is, for keeping goods that are brought there for the purpose of immediate transportation, and also goods transported to them on the railroad for immediate delivery to the consignee. The other is, for warehouses for the storage of goods brought there for carriage at some future time, and also of goods brought to them on the railroad, but to be delivered to the consignee at some future time, after the duties of the company as carriers have ceased.

The question arising in this case relates to their liability in respect to goods received at the depot to be carried. In respect to such goods, their liability as carriers commences as soon as the duty of immediate transportation arises, and not while they are delayed for the convenience of the owner. *Barron v. Eldredge*, 100 Mass. 455. In this case, the goods to be transported were 900 corn-planters. The defendants offered evidence tending to show that they were part of a lot of 1000, which the plaintiff was in the act of delivering; that they were detained at the depot to await the arrival of the remainder of the lot, for the plaintiff's convenience; that therefore the defendants were only subject to the liability of warehousemen; and that their duties as common carriers had not commenced, when the goods were consumed by fire. On the other hand, the plaintiff's evidence tended to show authority and direction from the plaintiff to forward the corn-planters as delivered. Upon proof of this, they would be liable as carriers. But the court ruled that if the defendants had either such authority or direction to forward them, as delivered, they would be liable as carriers; that is, they would be liable as carriers, if they had authority to convey them in this manner, though they were not directed to carry them thus and were under no obligation to do so. This was a stronger position against the defendants than the plaintiff had contended for.

There are various methods of transacting this species of business. Many articles are transported by car-loads, which are delivered at the depot on different days and in small quantities, and are kept there till one or more car-loads are collected. For example, barrels of flour may be sent in small parcels day by day, the understanding being that they will be kept in store until enough are collected to load one or more cars, because convenience and economy do not allow the company to transport smaller quantities as they arrive. At the same time, the owner may give them authority to transport the barrels in as small parcels and as frequently as they please, while he also consents that they may keep them in store until he furnishes a sufficient quantity to enable them to do the transportation in the usual and economical way. It cannot be said, in

such a case, that the duty of transportation arises upon the delivery of a single wagon-load. So in regard to these corn-planters, if the convenience of doing the business required the defendants to carry the whole lot together, instead of dividing the business into different jobs, to be done at different times, and this was known to the plaintiff, and he delivered the separate parcels at the depot to be stored till the whole lot should arrive, the goods would be stored in warehouse, although the plaintiff should have been willing that they should be carried in many small parcels, and should have given the defendants authority to carry them in that manner. It could not be said that the duty of carriage had commenced, until the whole had arrived. Yet the ruling of the court would make them liable merely because they had authority to carry them, though they were not instructed to do so and had not agreed to do so. It lays upon them the liability of carriers, while they have as yet assumed only the duties of warehousemen. The ruling should have been, that the defendants would be liable if they had authority and direction, and not if they had either authority or direction to forward the corn-planters as delivered.

A majority of the court are of opinion that the ruling was erroneous.

*Exceptions sustained.*¹

SHAW v. NORTHERN PACIFIC RAILROAD.

SUPREME COURT OF MINNESOTA, 1889.

[40 Minn. 144.]

DICKINSON, J. There was evidence justifying the jury in finding that, when the plaintiff was about to take passage upon a train of the defendant at Miles City, he delivered to it, for immediate transportation, his proper personal baggage, for the loss of which the action is brought; but that he then indicated for the convenience of the defendant, and not for his own purposes, that he did not care whether or not it was forwarded by the next train, which was soon to pass that station, as it would be five or six days before he would reach his destination. In other words, there was evidence, proper for the consideration of the jury, that the baggage was delivered to the carrier, and by it received, merely for transportation in the usual course of business, and not for storage. The liability of a common carrier, therefore, attached at the time of the delivery. *Lawrence v. Winona & St. Peter R. Co.*, 15 Minn. 313 (390); *Moses v. Boston & Maine R. Co.*, 24 N. H. 71 (55 Am. Dec. 222); *Barron v. Eldredge*, 100 Mass. 455; *Clarke v. Needles*, 25 Pa. St. 338. The baggage was not sent by the next train, but was put in the defendant's baggage-room, where it was destroyed by the burning of the building on the following day.

Order affirmed.

¹ See *Dixon v. Central Ry.*, 110 Ga. 184; *Ill. Cent. R. R. v. Ashmead*, 58 Ill. 487.—ED.

CARHART v. WAINMAN.

SUPREME COURT, GEORGIA, 1902.

[114 Ga. 632.]

SIMMONS, C. J. An action was brought by Carhart against Wainman, the proprietor of a hotel. The petition alleged that the plaintiff went to Bainbridge, Georgia, on a certain train, and was given a check for his baggage (a trunk) by the agents of the railway company. On reaching Bainbridge plaintiff left the train and went to the hotel run by Wainman. Next morning he gave his baggage-check to a porter who was employed by the defendant at the hotel, and whose duty it was to receive baggage and deliver the same to the guests. The baggage was never delivered to plaintiff. He made repeated demands upon the proprietor for either the trunk or the check, but the proprietor refused to deliver either to him. The trunk contained his clothing and was of a stated value. The prayer of this petition was for the value of the trunk and its contents, and for attorney's fees. The defendant demurred on the ground that the petition set forth no cause of action, and did not allege that the trunk was ever delivered by the railroad company to the defendant or his agent or to any one else upon the surrender of the check. The defendant also demurred specially to the prayer for attorney's fees. The court sustained the demurrers generally. The plaintiff excepted.

We think the petition set out a cause of action. An innkeeper is bound to extraordinary diligence in preserving the property of his guests entrusted to his care. Civil Code, § 2935. He is also bound by the actions of his servants within the scope of their employment. *Sasseen v. Clark*, 37 Ga. 242. If, therefore, a traveller gives his railroad baggage-check to a servant of an innkeeper whose duty it is to receive and deliver baggage to the guests, and the baggage is lost after it comes into his hands, the innkeeper is liable for the value of the baggage lost. If, after he has received the baggage, the innkeeper refuses to deliver it to the guest upon demand, he would be likewise liable. The delivery of the baggage-check to the innkeeper was, *prima facie*, equivalent to a delivery of the trunk. The check was a token or receipt for the plaintiff's trunk. While it was not conclusive of the delivery, it was *prima facie* evidence thereof. 4 Elliott, R. R. § 1655. The fact that the petition does not state that the porter received the trunk from the railroad company was not good ground of demurrer. That is a matter for defence. The innkeeper or his servant knew more about the delivery of the trunk than did the plaintiff. The defendant could easily show whether the trunk had been received or not, and it would be difficult for the plaintiff to do so. Of course, if it should appear that the trunk was not delivered by the railroad company, the

innkeeper would not be liable. Being bound to extraordinary diligence in the preservation of the baggage delivered him by guests, it is incumbent on the innkeeper to show that the trunk was not received by him or his servants. The guest makes out a case, *prima facie*, when he shows the delivery of the check to the servant within the scope of whose employment was the getting of baggage and delivering it to the guests, and that the innkeeper has refused to deliver to him the baggage or the check.

As to the special demurrer to the claim for attorney's fees, if the trial judge put his judgment upon that ground, he was no less in error. The petition alleged that the innkeeper had capriciously refused to comply with the plaintiff's demands for the delivery of the trunk or the check, and that the plaintiff was compelled to employ counsel to enforce his rights. If these allegations are true, then, under the Civil Code, § 3796, the jury might allow the plaintiff his attorney's fees as damages.¹

Judgment reversed. All the Justices concurring.

ARTHUR v. TEXAS AND PACIFIC RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1907.

[204 U. S. 505.]

THE action was to recover damages against the defendant for loss by fire of 50 bales of cotton, which were burned at Texarkana, Texas, September 19, 1900, and which the plaintiffs allege had been duly delivered to the defendant at that place, under a through bill of lading for transportation to Utica, New York.²

Upon the trial evidence was given tending to prove the following facts: The plaintiffs, with offices at Texarkana, were extensive buyers of cotton, which they purchased in the surrounding country and had it transported to that place as a place of concentration, where it might be classified and subsequently transported to the East and other parts of the country by the railroads.

The Union Compress Company was an independent corporation, doing business at Texarkana, as a compressor of cotton, which it compressed for the various railroads having tracks at that place. The compress company had a platform on its own land, of about 400 × 600 feet, upon which cotton was delivered from wagons and from railroad cars, and the receipt of the cotton was acknowledged by the compress

¹ See *Southern Ry. v. Bickley* (Tenn.), 107 S. W. 680. — ED.

² Part of the statement of facts and part of the opinion, in which other points were discussed, are omitted. — ED.

company. From this platform cotton was loaded on the respective cars of the different railroads, the tracks of which surrounded the platform on three of its sides. This platform was within the State of Texas. Substantially all the cotton received at Texarkana was received at this platform. The local platform of the defendant company was not calculated to receive cotton for shipment by the company, on account of its small size, and the defendant's agent testified that he would not know what to do with cotton if offered at this platform, except to send it to the platform of the compress company. When cotton was placed on the platform of the compress company it did not then compress it, but it remained there until further orders were given, as herein stated. After delivery on the platform, and after the shipper had procured the written acknowledgment of the receipt of the cotton by the compress company, the practice was for the shipper, when he was ready to have it shipped, to go to the railway company, and upon the surrender of the receipts of the compress company to the agent of the railway company the shipper would receive from such agent a bill of lading for the cotton, which acknowledged its receipt by the company and the place and person it was consigned to, and the shipper had nothing further to do in regard to the cotton. He issued no orders for compressing it, and was not allowed to route it by any particular route. He would identify the cotton covered by the bill and give the destination point of the cotton and the name of the consignee, and there his right ended. The railroad company, when it received from the shipper the compress company's receipt, and gave its bill of lading to the shipper, took the receipts to the compress company and gave them up, and directed the company to compress the cotton and obtain insurance upon it covering the responsibility of the railroad company, and load it into cars to be designated by the railroad company's agent. It was a general understanding between the railroad company and the compress company that when the former delivered the cotton receipts to the compress company it was to compress the cotton, obtain the insurance and give the policies to the agent of the railway company, and ship the cotton on the cars pointed out by the railway company's agent. There is no evidence that the compress company ever compressed cotton at the orders of the shipper, or charged him for the storage of the cotton on the platform. The compressing was in fact done by the compress company for the railway company, for its convenience, by its direction and at its cost. While the cotton was being compressed the compress company was not under the control of the railway company in matters relating to the mode and manner of compressing, nor were the employees of the compress company under any control by the railway company, but the compress company followed the orders of the railway company when to compress and where to load the cotton after compressing.

This customary way of doing business was followed with regard to the cotton in question. It was received on the platform of the compress company from plaintiffs, and receipts given for it to them. These re-

ceipts were taken on September 17, 1900, to the agent of the railway company, who thereupon signed and delivered a bill of lading to plaintiffs, acknowledging the receipt of the cotton to be transported to Utica, New York, at named rates. The agent of the railway company then took these receipts which plaintiffs had handed to him, and delivered them to the compress company and gave written instructions, signed by such agent, to the compress company on a form customarily used, and which ran thus: "I have this day issued on your compress receipts bill of lading to W. A. Arthur & Company for 50 bales of cotton, (marks, number of bales, and total weight given.) Domestic. Compress and ship the above cotton," as stated in directions. The compress company, when its own receipts were delivered to it by the railway company's agent, in accordance with its general custom, caused this cotton to be insured for the benefit of the defendant company and in the name of that company, and delivered the policies to the agent of the railway company, who forwarded them to division headquarters at Dallas, Texas. The compress company paid for the insurance under the direction of the railway company.

It was while the cotton was still on the platform and not yet compressed that it was burned.

PECKHAM, J. . . . Upon the evidence in this case, was there a delivery? The evidence showed that the cotton was not delivered on the platform by the plaintiffs for the purpose of being compressed for them by the compress company. The order to compress was subsequently given by the railway company. That company had no other place for the delivery of the cotton to it than at this platform, but, as there were three companies with tracks at the platform, with either one of which the shipper might contract for the transportation of the cotton, it cannot be held that there was at the time of the delivery of the cotton at the platform a delivery to the defendant, especially as the compress company itself acknowledged the receipt of the cotton. But when these receipts were handed by the plaintiffs to the defendant's agent, who took them and issued a bill of lading to the plaintiffs, the constructive possession and the entire control of the cotton passed to the defendant. It could then, if so minded, have taken the cotton and loaded it on cars and taken it away without having had it compressed. It was, however, compressed by its own order, given in writing to the compress company, and for its own convenience and at its own cost, and the insurance was obtained by its direction by the compress company, in the name of the defendant and for its benefit, and such policies were delivered to the defendant and sent by its agent to Dallas. Most probably the cost of compression and insurance was paid by the plaintiffs in the rate paid by them for the transportation of the cotton, as that cost was one of the factors which may be supposed to have entered into the rate of freight charged by the defendant; but the total sum paid for transportation by plaintiffs left the matter with defendant to compress and insure if it

saw fit, which it probably would think fit to do in all cases as an ordinary business precaution. The fact that in getting the cotton compressed the railway chose to have it done by an independent contractor, over whose acts it had no control while the cotton was being compressed, and the fact that it would order the compress company after compressing to load the cotton on cars selected by defendant's agent, did not in any way affect the fact that the cotton had been received by the railway company, and that it was thereafter subject to its full control. The defendant could not divest itself of the responsibility of due care by leaving the cotton to be compressed and loaded by the compress company. The latter company was, while so acting, the agent of the defendant, chosen by it, and, as such, the defendant was responsible for any lack of proper care of the cotton by the compress company. *Bank of Kentucky v. Adams Express Co.*, 93 U. S.

It is urged that the case cited does not cover the facts herein, because in the reported case the attempt was to secure the immunity of the defendant express company from the consequences of the negligence of the railroad in doing the very thing that the express company had agreed to do, viz., transport the money; while in the case before us the negligence of the compress company (assuming there was such) was not in transporting the cotton, which the railway company had agreed to do, but in caring for it while awaiting compression. We see no difference, in fact, which would lead to a different result.

The compression was done for the convenience of the railroad company, after the company had received the cotton and before the actual transportation had commenced. In order to enable it the more conveniently to do the work of transportation it cannot divest itself of its obligation to exercise due care while the cotton is in the control of the compress company, although the latter is an independent contractor and not under the immediate control of the railway company while doing the work of compression in its behalf. There would be no justice in such holding, and we are clear it would violate the general rule that the carrier, after the freight has been received by it, must be regarded as liable, at least, for the negligence of its own servants, and also for that of the servants of an independent contractor, employed by it to do work upon the freight for its own convenience and at its own cost. . . .

We think the evidence in this case made out a delivery to and acceptance by the railway company of the cotton in question, and that the compress company had the actual custody of the cotton as the agent of the railway company, and the question of whether the persons in whose custody it was, at the time of the fire, were guilty of negligence was a question which should have been submitted to the jury.

KING v. LENOX.

SUPREME COURT, NEW YORK, 1821.

[19 *Johns*, 235.]

THIS was an action of assumpsit, brought against the defendant, as owner of the ship called the *Ram-Duloll-Day*, to recover the value of certain goods shipped on board of that vessel, on account of the plaintiffs, and consigned to them, on her voyage from Calcutta to New York, in the year 1817. The cause was tried before Mr. Chief Justice Spencer, at the New York sittings, in April, 1820. A verdict was taken for the plaintiffs, for 1,494 dollars and 75 cents, subject to the opinion of the Court on a case made.

It appeared that the master of the *R.* on the outward voyage from New York to Calcutta, received from the plaintiffs a quantity of cheese and verdigris, which was shipped as part of the master's privilege, allowed to him, as is usual by owners of vessels, and which were sold in *C.*, two-thirds for account of the plaintiffs, and one-third for account of the master; and the proceeds, deducting the homeward freight and commission which were received by the masters, were invested in the goods of the country, packed in a trunk, laden on board of the *R.* and consigned to the plaintiffs, at New York. No part of the shipment, outward or homeward, or the freight or commissions, were entered in the ship's accounts; but the same were considered as part of the master's privilege. The ship was not a general ship, but was wholly laden on account of the owner, except the usual privileges allowed the supercargo, master, and other officers. The trunk containing the goods in question was stowed in the cabin of the ship, under the master's berth, where he usually stows some part of his privilege. The master died on the homeward voyage. On the arrival of the ship at New York, the trunk consigned to the plaintiffs was opened at the custom house, by persons appointed by the collector of the customs; when two shawls, all the pearls, and eight pieces of Choppa Romalls, mentioned in the invoice, to recover the value of which this suit was brought, were missing.

PER CURIAM. The owner of a ship is bound for the lawful contracts of the master, when made by him relative to the usual employment of the vessel; both on the ground of such employment, and of the profit which they derive from it; and the course of usual employment is evidence of authority given by the owner to make a contract for them. *Abbott on Ships*, 3d ed. 113, part 1, c. 3, s. 2. The plaintiffs, in this case, contracted with the master himself, knowing that he received their goods on his own account, as part of his privilege, and not in his character of agent for the owners. The contract was not made by any implied authority of the owners, arising out of the usual course of

employment. The ship was freighted wholly by the owner; and the master had no authority from the defendant to receive goods on freight. *Walter v. Brewer*, 11 Mass. Rep. 99; *Reynolds v. Toppan*, 15 Mass. Rep. 370. We are, therefore, clearly of opinion, that the defendant is entitled to judgment. *Judgment for the defendant.*

BIRD *v.* BIRD.

COMMON BENCH, 1558.

[*Anderson*, 29.]

BIRD brought action on the case against Bird for that the plaintiff brought into the plaintiff's [defendant's?] hotel certain stuff, and was lodged there; which stuff by default of the plaintiff [defendant?] and his servants was stolen from him out of the said house. The defendant said that the goods were not taken by default of himself or his servants; and upon this they were at issue.

The defendant gave in evidence that the plaintiff came to his house for the purpose of lodging there, and the defendant told him that his inn was full of guests, and there was no room for him, and therefore he would not receive him; and that the plaintiff notwithstanding this would not depart, but put his goods in the said inn and went to bed there by sufferance of some other person without the assent of the said innkeeper or his servants. And this was held good evidence by the Justices; whereupon the jury gave a verdict for the defendant.

BRIEN *v.* BENNETT.

NISI PRIUS, 1839.

[8 *C. & P.* 724.]

CASE for negligently injuring a passenger. Pleas 3d, that the plaintiff was not a passenger.¹

It appeared that the defendant's omnibus was passing on its journey when the plaintiff, who was a gentleman considerably advanced in years, held up his finger to cause the driver of the omnibus to stop and take him up, and that upon his doing so the driver pulled up, and the conductor opened the omnibus door; and that just as the plaintiff was putting his foot on the step of the omnibus, the driver, supposing that the plaintiff had got into it, drove on, and the plaintiff fell on his face on the ground, and was much hurt.

¹ This short statement of the effect of the pleadings is substituted for that of the reporters. — Ed.

Platt, for the defendant. I submit that the plaintiff was never a passenger.

LORD ABINGER, C. B. I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger, and that it is evidence to go to the jury.

Verdict for the plaintiff—Damages £5.

GASTENHOFER v. CLAIR.

COURT OF COMMON PLEAS, NEW YORK, 1881.

[10 *Daly*, 265.]

APPEAL from a judgment of the district court in the City of New York for the Sixth Judicial District.

The action was brought to recover damages for the loss of the plaintiff's overcoat at the defendant's hotel. The plaintiff's uncle was a guest at the Park Avenue Hotel, corner of 32d Street and 4th Avenue, in the City of New York. The plaintiff lived at No. 31 West 20th Street, New York. He was invited by his uncle to dine with him and his family at the hotel and go afterwards to the Charity Ball. Pursuant to the invitation plaintiff went to the hotel about half-past six o'clock, on the evening of February 3d, 1881, looked in the register, found his uncle's name, inquired for his room of the clerk, sent up his card, and on being informed he was not in, went up with a servant to his uncle's room to seek for him, but did not find him, after a while went into the dining room and walked through, and looked for him, did not see him, went into the lower dining room and ordered his dinner, dined and came out, and then met his uncle and was taken by him into the upper dining room to dine. On going into the lower dining room he left his coat and hat with a boy in attendance and received them back when he came out. Before going into the upper dining room with his uncle, he placed his coat on a chair alongside a rack on which there was clothing, in a room outside the upper dining room, there being no attendant. On leaving the said dining room he could not find his coat, but found his hat and "articles." He went to the office of the hotel, and search was made for the coat, but it could not be found. He borrowed his uncle's coat to go out and procure another coat, then returned to the hotel and went with the party to the ball, came back to the hotel afterwards but did not stay all night. The dinner was afterwards charged to the plaintiff but subsequently to the uncle and paid for by him.

The justice rendered judgment in favor of the plaintiff. From the judgment the defendant appealed to this court.

J. E. DALY, J. (After stating the facts as above.) The rule that makes the landlord of an inn responsible for the goods of his guest is

a severe one, and can only be applied where the conventional relation of inn-keeper and guest exists. It cannot be extended so as to protect one who is not a guest, but a mere caller on a guest, or a transient visitor upon the invitation of a guest. Such was the status of the plaintiff in this case. He claims to have become a guest himself by ordering and taking dinner while waiting for his uncle. This put him in no different position from that he would have occupied had he sat down with his uncle as he had been invited to do. He was there upon invitation of that gentleman and with no intent to sojourn at the hotel as a guest for even the briefest period. This distinguishes the case from *Kopper v. Willis* (9 Daly, 460), and from *Bennet v. Mellor* (5 T. R. 273), where the parties came to the inn to partake of its entertainment or accommodation, and for no other purpose. In the former case, plaintiff went with a friend, on the invitation of the latter, into the defendant's restaurant, frequented by transient parties, to get a meal. Plaintiff was just as much a guest as his friend was, for the latter was not stopping at the place, and the invitation merely involved the paying for the entertainment of both. In the other case, one of the strictest applications of the rule in the books, plaintiff's servant went to the defendant's inn to leave the goods he was carrying until the next market day. He was refused that accommodation, but on asking refreshment it was furnished him. The entertainment of the house had thus been extended to him as a guest, and the landlord was held liable. It is not the fact that a person does or does not take lodgings or partake of refreshments in the inn that makes him a guest. It is the motive with which he visits the place: whether to use it even for the briefest period or the most trifling purpose as a public house or not: and I think it will be long before the courts will be disposed to hold landlords liable for the property of persons who call to visit their guests, and incidentally enjoy the hospitality of the house. The taking of the dinner without notice to the proprietor or the clerk no more constituted plaintiff a guest than his sitting in the parlor, using the reading-room or writing-room, etc., for any period, while waiting for his host to appear.

The judgment should be reversed with costs.

VAN HOESEN, J. There must be at least two parties to every contract, and when it is attempted to charge an inn-keeper with liability for the loss of goods belonging to a person who asserts that he was a guest, the inquiry is, how was the relation of guest and inn-keeper created? No person can make himself a guest without the inn-keeper's assent. Of course, that assent may be given by an agent or a servant, entrusted with the duty of receiving and rejecting travellers. There need be no formal bargain, for the acceptance of a person as a guest will be implied, where he calls for refreshment which is furnished to him by a servant who has the discretion either to give or to withhold it. But a man cannot make himself a guest by slipping into the dining room of a hotel and ordering a dinner of a waiter who has no discretion

whatever, and who brings what is ordered, under the belief that the person who gives the order is in the dining room by permission of the inn-keeper. Permission to enter the dining room cannot be implied. A man can no more enter the dining room without permission, than he can enter a sleeping room and go to bed without permission. He must first give the inn-keeper an opportunity to receive or reject him. If he be accepted as a guest he is, of course, entitled to the usual privileges of a guest, and if the inn-keeper refuse, without reason, to receive him, an indictment, and a civil action for damages, will lie against him. Neither Clair, the inn-keeper, nor any of his clerks, nor any person who had the slightest control over any branch of the business of the inn, knew that Gastenhofer wished to become a guest. He went, uninvited, into the dining room, and without the consent, express or implied, of any one in authority, ordered a dinner, which a waiter brought to him. This dining room was not a public restaurant, and, therefore, the *Kopper* case, which is relied on by the plaintiff, does not apply. In that case *Kopper* went into an eating-house, by general invitation of the proprietor to the public, and with the understanding that all who came should be served without any previous arrangement with, or application to, the landlord. We held that he was a guest, as it appeared that the place was licensed as an inn, and that he had received refreshments in the usual way. No one had a right to enter the dining room of the Park Avenue Hotel until he had received the permission of Clair, the inn-keeper. There appears to be no doubt that the plaintiff, being a man of respectability, would have been received, but it is of no moment whether that be so or not; so long as it takes two to make a bargain, he could not become a guest without making an application to be received as such to Clair, or to some person authorized to act for him in such a matter.

It is on this ground alone that I place my decision, though I concur with Judge DALY in reversing the judgment.

Judgment reversed, with costs.

MERRILL v. EASTERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1885.

[139 Mass 238.]

HOLMES, J. This is an action of tort, under the Pub. Sts. c. 112, § 212, alleging that the plaintiff's intestate was a passenger upon a train of the defendant; and that, by reason of the defendant's negligence and the gross carelessness of its servants, his life was lost. There are three specifications. First, that the train was overloaded and the life of the intestate lost, because, by reason of the insufficiency of its rules, the corporation failed to make proper provision for carrying passengers. Second, that the train was overloaded by the unfitness of the defendant's

servants. Third, that the intestate's life was lost by the gross negligence of the defendant's servants "in failing to provide sufficient cars for the reasonable accommodation of passengers, and in the overloading, running, and management of said train."

The plaintiff's intestate had been travelling upon the engine, but got off at East Salisbury, a station where the train stopped, and, after the conductor had called out, "All aboard," and the train had started, ran and got upon the front platform of the front passenger car. The train was crowded, but there was no evidence that it would have been impossible for the deceased to reach the inside of the car, and there was testimony that he could have done so, and that he was asked by the brakeman to get out of the way so that the latter could do his work, but retorted that he had been on this road twenty years, and knew more about railroads than the brakeman did. The deceased stood upon the step of the platform facing inward, and after the train had gone from a quarter to half a mile fell off and was killed. In half a mile the train had reached a speed of thirty miles an hour, and, according to some of the witnesses, it was swaying violently when the deceased fell. The track was straight. The court ruled that the action could not be maintained upon the evidence, and directed a verdict for the defendant.

We are of opinion that the ruling was correct, and that none of the specifications were maintained. If we should assume that the deceased had acquired the rights of a passenger, and that the defendant failed to make proper provision for carrying passengers, or that the train was overloaded by the unfitness of the defendant's servants, still we should have some difficulty in saying that the overloading was the cause of the death, notwithstanding the decision in *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211. For if the place which the deceased took was unfit and dangerous, its unfitness and danger already existed and were manifest before he took it. If there was a crowd on the platform, the deceased saw it. And certainly the argument would be strong that he, rather than the defendant, was the cause of his being where he was, and of his exposure to the danger incident to that place.

But we do not pass upon this point, because we cannot assume that the deceased had acquired the rights of a passenger. He did not do so when he got upon the engine, a place to which he was not invited, and which every one knows is not intended for passengers, and where in this case he would have escaped paying fare, as it was inaccessible to the conductor. Then, supposing that his start upon the engine did not give a character to his subsequent relation to the defendant, (*Swan v. Manchester & Lawrence Railroad*, 132 Mass. 116, 120,) and that the deceased was in the same position as if he had attempted to get on at East Salisbury for the first time, it is clear that, when he attempted to get upon the moving train after it had started, he was outside of any implied invitation on the part of the defendant, and did not at once acquire the rights of a passenger in the hands of a carrier.

We may admit that, if he had reached a place of safety and seated

himself inside the car, the bailment of his person to the defendant would have been accomplished, so that he would not have been prevented from asserting such rights because of his improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him on the threshold, and had put himself in the proper place for the carriage of passengers.

It is no answer to say that he was prevented from doing so by the defendant's fault. There was no evidence that the deceased was compelled to remain on the step of the platform. But even if the jury would have been warranted in finding that there was such a crowd that the deceased naturally stopped where he was, although not strictly compelled to do so, and that the crowding was due to the defendant's fault, still there was no fault as toward the deceased, because the defendant was not bound to provide for the contingency of people getting upon the train after it had started. We may add, that there is not a particle of evidence that, if the deceased had got upon the train at the proper time, he could not have reached the inside of the car.

There is nothing in the subsequent conduct of the defendant of which the plaintiff can complain. The defendant was not bound to stop its train by reason of anything which it is shown to have known, or of which there is any evidence. And if the defendant had a right to run its train at all, it was not gross negligence to run it at the rate of thirty miles an hour on a straight track. There was no allegation or proof of any defect in the cars which made the motion worse than usual. The speed was not unusual, and moreover it was hardly connected with the death by anything more substantial than conjecture.

*Exceptions overruled.*¹

WEBSTER v. FITCHBURG RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1894.

[161 *Mass.* 298.]

KNOWLTON, J. At the trial the plaintiff relied solely on her count under Pub. Sts. c. 112, § 212, in which she alleged that her intestate was a passenger on the defendant's railroad, and the only question in the case is whether there was evidence to warrant the jury in finding that he was a passenger. He had in his pocket a ten-trip ticket, which entitled him to ride over the defendant's railroad between Boston and the station in Somerville where the accident happened, and immediately before he was struck and killed he was running very rapidly from the direction of the public street across the defendant's premises outside of the passenger station to a track on which was an incoming train, ap-

¹ But see *Sharrer v. Paxson*, 171 Pa. 26. — Ed.

parently with a view to take another train which was about to start for Boston on the track beyond. It is contended, in behalf of the plaintiff, that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises in a place designed for the use of passengers outside of the station, and was about to take a train, he had become a passenger.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207, it was said: "When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger.

In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present and speaking by a representative who saw him, there was no instant when the answer to his request would not have been, "We will not accept you as a passenger while you are ex-

posing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way."

The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case. *Dodge v. Boston & Bangor Steamship Co.*, *ubi supra*; *Merrill v. Eastern Railroad*, 139 Mass. 238; *Commonwealth v. Boston & Maine Railroad*, 129 Mass. 500; *Warren v. Fitchburg Railroad*, 8 Allen, 227; *Baltimore Traction Co. v. State*, 28 Atl. Rep. 397.

Exceptions overruled.

ILLINOIS CENTRAL RAILROAD v. O'KEEFE.

SUPREME COURT OF ILLINOIS, 1897.

[168 Ill. 115.]

CARTWRIGHT, J.¹ . . . It was also necessary for the plaintiff to prove that the relation of passenger and carrier existed between the deceased and the defendant. This relation which was claimed to exist is a contract relation. A railroad company holds itself out as ready to receive and carry, and is bound to receive and carry, all passengers who offer themselves as such at the places provided for taking passage on its trains, and who take such passage in the cars provided for passengers. When one so presents himself the contract relation under which he acquires the rights of a passenger may be either express or may be implied from the circumstances. If a person goes upon cars provided by the railroad company for the transportation of passengers, with the purpose of carriage as a passenger with the consent, express or implied, of the railroad company, he is presumptively a passenger. *Elliott on Railroads*, sec. 1578. Both parties must enter into and be bound by the contract. The passenger may do this by putting himself into the care of the railroad company to be transported, and the company does it by expressly or impliedly receiving him and accepting him as a passenger. The acceptance of the passenger need not be direct or express, but there must be something from which it may be fairly implied. One does not become a passenger until he has put himself in charge of the carrier and has been expressly or impliedly received as such by the carrier. *Bricker v. Railroad Co.* 132 Pa. St. 1; *Webster v. Fitchburg Railroad Co.* 161 Mass. 298; *Elliott on Railroads*, sec. 1581. Deceased was the holder of a free pass on the road, but that fact alone would not create the relation of passenger and carrier. The purchase of a ticket does not make one a passenger unless he comes under the charge of the carrier and is accepted for carriage by virtue of it. If a ticket holder should offer himself as a passenger and should be re-

¹ Part of the opinion only is given. — ED.

fused transportation there would be a liability for consequent damages, but it would not be a liability to him as a passenger or on account of the relation of passenger and carrier, but would be a liability for the refusal to enter into that relation and to permit him to become a passenger.

The uncontroverted evidence bearing upon the question whether O'Keefe became a passenger was as follows: He lived about three hundred yards north and fifty yards east of defendant's station at Anna. The limited vestibule train on defendant's road came from the south and stopped at the station while he was sitting at the table at home, eating breakfast. The train consisted of a baggage car, two coaches and a sleeping car. It was a solid vestibuled train, the vestibules filling the spaces between the cars, with a door at each entrance and exit to and from the platforms of the passenger coaches. These doors are opened at the stations to discharge passengers who have reached their destination and to receive those desiring to become passengers, and these are the places where passengers present themselves to take passage. While this train was at the station at Anna it was prepared for the reception of passengers who desired to be transported to other stations, by opening the doors, and passengers for Anna were discharged at the station. When the doors are closed a person on the outside can not get in, and when the business at that station had been done the doors designed for the admission of passengers were closed, and the train left the station as a solid train, closed and inaccessible up to the platform next the tender, in front of the baggage car. When the train was moving from the station O'Keefe took his hat and ran out of the door, and ran to the railroad track and south toward the approaching train. When he met the train it was going three or four miles an hour, and he climbed on the platform next the tender, at the front end of the baggage car. As he passed his house his wife saw him standing on the platform with his back against the baggage car door. The engineer and conductor saw him climb on the platform but did not see him afterward, and the conductor did not know who he was. He was not seen after his wife saw him until he was found dead, sitting on the step of the platform, holding the guard rail with one hand. When found he had a piece of paper in one hand and a pencil was lying on the ground. After leaving Anna the conductor went through the train, commencing at the north end of the first passenger coach next the baggage car and going the entire length of the train. He then came back, unlocked the door to the baggage car, and went in, as he said, to see about the person who got on the platform, and, seeing the other train approaching, he and the baggageman jumped off through the side door.

The question is whether these facts fairly tend to establish the relation of passenger and carrier between O'Keefe and the defendant, by showing that he had put himself in the care of the defendant as a passenger, and had been expressly or impliedly received and accepted as such by

the defendant through any authorized agent. We think that they do not. He did not go upon the train at the station provided for the reception of passengers, and did not take any place provided for the reception, accommodation or carriage of passengers. He did not comply with any of the ordinary customs under which defendant held itself out as ready to receive and carry passengers or under which they are received or carried. It is said that he no doubt tried to open the baggage car door, and the inference intended is, that he tried to put himself in charge of defendant as a passenger, in a proper place. There is no evidence of the supposed fact, and if there were it could make no difference. It will certainly not be claimed that defendant was bound to have the baggage car door open so as to give access to its passenger coaches by way of the baggage car. But even if that were a wrong to him, he could not become a passenger by attempting to get in that door any more than if he had attempted to open one of the vestibule doors which was locked, and had failed. He had not put himself in the care of the defendant as a passenger. Of course, the fact that the engineer knew that deceased climbed upon the train would not make him a passenger, since an engineer is not authorized to act for the defendant in such a matter or to accept passengers. Nor do we think that the mere fact of the conductor knowing that some one had boarded the moving train on the platform between the tender and baggage car, and might still be there, is evidence tending to show that defendant accepted him as a passenger. The conductor did not know who he was or what he was there for, — whether as a passenger or otherwise. As conductor he performed the usual duties after leaving the station, and had not reached this platform next the tender when the accident occurred. He had done nothing in the matter one way or the other. The train was moving slowly when O'Keefe climbed on. But that fact is only material on the question of negligence on his part in boarding a moving train. The train had left the station, and there would be no difference, so far as creating a relation of passenger and carrier was concerned, whether he got on there or at some other place between stations where the train was moving slowly. Of course, he might have ridden on the platform in safety but for the collision, and so also he might on the engine or tender, or elsewhere on the train where passengers are not carried. That fact concerns only the question of negligence, and is not material on the question whether he became a passenger.

As we have concluded that there was no evidence tending to establish one necessary element for a recovery, — that the deceased was a passenger on defendant's train, — it follows that for such failure of proof the instruction asked¹ should have been given.

¹ At the close of the evidence the defendant asked the court to instruct the jury that such evidence was not sufficient to authorize a verdict for the plaintiff, and that they should find the defendant not guilty. The instruction was refused and the defendant excepted. — *Ed.*

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

CARTER, J., dissented.¹

ILLINOIS CENTRAL RAILROAD *v.* TREAT.

SUPREME COURT OF ILLINOIS, 1899.

[179 Ill. 576.]

CARTER, C. J.² Emma A. Treat, the appellee, recovered a judgment against appellant on account of a personal injury received by her on October 23, 1893, while attempting to board one of appellant's trains at its Van Buren street station, in Chicago, for the World's Fair, at Jackson Park. The Appellate Court has affirmed that judgment. Appellant had erected a viaduct over its tracks at this station, with stairways, one for ingress and the other for egress of passengers. . . . The relation of carrier and passenger existed between appellant and appellee. She had procured her ticket, passed through the turn-stiles provided by appellant, had there delivered her ticket to appellant and had entered upon the platform constructed by appellant exclusively for passengers, and was about to enter appellant's car when she was injured. Appellant was therefore bound to exercise a high degree of care to avoid injuring the appellee, its passenger. 4 Elliott on Railroads, secs. 1579, 1589.

DUCHEMIN *v.* BOSTON ELEVATED RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1904.

[186 Mass. 353.]

BARKER, J.³ The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The case stated in the declaration is that as the car approached the plaintiff he went toward it for the purpose of entering it having given the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the trolley pole fell striking a sign upon the car and the pole and sign struck the plaintiff, he being in the exercise of due care and the defendant negligent.

. . . It should be noted that in the charge the jury were instructed that the suit was not brought as in the right of a person upon the street;

¹ *Acc. Missouri K. & T. Ry. v. Williams*, 91 Tex. 255; but see *Martin v. Southern Ry.*, 51 S. C. 150. — ED.

² Part of the opinion only is given.

³ Part of the opinion is omitted. — ED.

that the standards of care are quite different in the case of a passer-by upon a street struck by apparatus falling from a car, and that if the plaintiff had not become a passenger he could not recover. We assume that this portion of the charge was understood to mean, that, if the car had not stopped to receive the plaintiff, or, if he was attempting to go to it or to board it when it had stopped for some other purpose than to receive passengers and he had made to those in charge of the car no sign that he intended to take the car or had received from them in return no indication of assent to such a signal, or if he was attempting to reach or board the car while it was yet in motion, he could not recover.

This leaves as the turning point of the case the question whether a foot traveller on the highway who is approaching a street car stopped to receive him as a passenger, and before he actually has reached the car, is entitled to the rights of a passenger in respect of that extraordinary degree of care due to passengers from common carriers, at least so far as any defect in that car is concerned.

In other words the question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car and had not yet reached it that it would owe to a passenger.

It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth or the street clear of obstructions to his progress than it owes to all other travellers on the highway. It is under no obligation to see that he is not assaulted, or run into by vehicles or travellers, or not insulted or otherwise mistreated by other persons present.

Nor do we think that as to such a person, who has not yet reached the car, there is any other duty as to the car itself than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveller on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to

him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others.

The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only by its exercise of the calling of a common carrier, and its obligation as such does not arise until the intending passenger is within its control. We are unwilling to go farther than the doctrine stated in *Davey v. Greenfield & Turner's Falls Street Railway*, 177 Mass. 106, that when there has been an invitation on the part of the carrier by stopping for the reception of a passenger any person actually taking hold of the car and beginning to enter it is a passenger. See *Gordon v. West End Street Railway*, 175 Mass. 181, 183, and cases cited.

If the instructions allowed the jury to find for the plaintiff only in case the car had reached a usual stopping place and had stopped to receive him, there was error in ruling that under those circumstances and before he had actually reached the car he had a right to have the defendant exercise as to him that extraordinary degree of care due to passengers. So long as he remained a mere traveller on the highway, although walking upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any person on the highway. Whether one just has dismounted from a street car, or just is about to board one he does not have the rights of a passenger.

Exceptions sustained.

HOGNER *v.* BOSTON ELEVATED RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1908.

[198 Mass. 260.]

TORT for personal injuries alleged to have been received by the plaintiff while being removed by force from the lower step of a closed electric car of the defendant.¹

HAMMOND, J. The relation of carrier and passenger is created by contract express or implied. In the case of a street railway company, it is rarely created by express contract when the car is boarded by the passenger from the street. Whether the relation has begun is generally to be shown by the circumstances. But, however shown, it must appear at least that the passenger has offered himself and has been accepted. It is not enough that he has offered himself. The acceptance by the carrier is needed. It is true that the carrier ought to consent where there is no reasonable objection. Still it does not necessarily follow that it has consented or will consent in any given case. For no good reason it may decline to accept the offered passen-

¹ The statement of facts and part of the opinion are omitted. — Ed.

ger; and in such case he cannot become a passenger by forcing his way upon the car against the will of the carrier. His remedy is by way of damages for the unwarrantable refusal to accept him. These principles are too familiar to require the citation of authorities in their support.

Upon the evidence the question whether the plaintiff was a passenger was for the jury. If the evidence for the defendant was believed, the jury might find that neither by the motorman nor by the conductor was the plaintiff recognized as a proposed passenger, much less accepted as such; but that the plaintiff, without the knowledge of either, got upon the step of the car while it was in motion, and that the conductor, as soon as he saw him, refused to accept him as a passenger unless he would get above the lower step where he was standing, and that the plaintiff refused to accept this condition. If such was the case, the jury might well find that the contract of carriage never had been made, or in other words, that the plaintiff never became a passenger. The plaintiff, relying upon cases like *Brien v. Bennett*, 8 Car. & P. 724, *Gordon v. West End Street Railway*, 175 Mass. 181, and *Smith v. St. Paul City Railway*, 32 Minn. 1, strongly contends that as matter of law the plaintiff became a passenger as soon as he got upon the step. In all those cases, however, it appeared that the car or vehicle had stopped in obedience to a signal from the proposed passenger. In other words, the passenger had offered himself and been accepted; and the act of getting upon the step was an act done in pursuance of the contract. These and similar cases cannot be regarded as authorities in support of the proposition that upon the evidence in this case the plaintiff became a passenger as soon as he stepped upon the car.¹

LOCKWOOD v. BOSTON ELEVATED RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1909.

[200 Mass. 537.]

BRALEY, J.² . . . It is the defendant's theory of the injury, upon the evidence which it introduced, that, without having been either recognized or accepted as a passenger, the plaintiff was injured while in the attempt to board a moving car as it was passing between the signal posts. Undoubtedly there must be an acceptance by the carrier, before the person who offers himself, becomes a passenger. But the principle as applied to those who offer themselves for transportation by railroads, whose trains stop only at fixed stations, where the carrier only holds itself out to receive and transport as passengers those who present themselves in the usual way, has not been held applicable to passengers upon street railways, unless at least it appears that the operating com-

¹ See *Higley v. Gilmer*, 3 Mont. 90. — Ed.

² Part of the opinion only is given — Ed.

pany makes a rule that passengers will not be taken on except at designated places. *Merrill v. Eastern Railroad*, 139 Mass. 238; *Webster v. Fitchburg Railroad*, 161 Mass. 298; *Corlin v. West End Street Railway*, 154 Mass. 197. There was no evidence offered by the defendant, that it had made, promulgated or enforced such a rule, or established such a custom. Nor did it appear that the plaintiff had any knowledge of such a regulation inferentially derived from his observation of the placing of signal posts, or of the manner in which its cars were generally operated. *McDonough v. Boston Elevated Railway*, 191 Mass. 509, 511.

But, even if the car had been boarded while it was moving slowly between the signal posts after the plaintiff had stepped on the running board, the conductor, who testified that he saw the men coming to get on the car and further said that he saw the plaintiff there, gave no order to him not to get on, and made no objection or dissent either verbally or by gesture that he was unlawfully on board. To remain standing on the running board of an open street railway car while being transported is not ordinarily of itself wrongful, and under these conditions the contract of carriage could have been found by the jury to have been complete. *Briggs v. Union Street Railway*, 148 Mass. 72, 75; *Pomeroy v. Boston & Northern Street Railway*, 193 Mass. 507, 511, and cases cited.

WILTON v. MIDDLESEX RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1871.

[107 Mass. 108.]

MORRIS, J. The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge about seven o'clock in an evening in July. One of the defendants' cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver.

Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

A master is bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master. Rams-

den *v.* Boston & Albany Railroad Co., 104 Mass. 117, and cases cited. The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

It follows, that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover, if she proves that she was using due care at the time of the injury and that she was injured by the negligence of the driver. Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468, 483.

In the present aspect of the case, we are not called upon to consider to what extent the defendants might be held liable if it were shown that the plaintiff was unlawfully riding upon the car.

Case to stand for trial.

EATON v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD.

COMMISSION OF APPEALS. NEW YORK, 1874.

[57 N. Y. 382.]

DWIGHT, C.¹ . . . The facts of the case, so far as it is necessary to consider them, are briefly these; they are stated in the form most favorable to the plaintiff: He, being then under twenty-one years of age was, with two other boys, walking toward his home on the railroad track, and, having been passed by a coal train, moving slowly, was beckoned by the conductor in charge of it, who was then on the rear car, a caboose (to be hereafter described), to get upon the train. The plaintiff and his associates acted accordingly. The conductor, afterward, solicited them to go with him, upon his return trip, to a place called Phillipsburgh, where he would procure for them situations as brakemen. They went with him. The train, toward morning, stopped on the track at a point where there was a sharp curve in the road. The conductor was guilty of negligence, in not sending back a flagman, to warn an approaching train. No signal was given, nor was any light exposed for this purpose. A collision occurred, by which the plaintiff sustained serious injury, without negligence on his part. The rear car, or "caboose," in which the plaintiff was at the time of the injury, was supplied with a stove, and there were boxes running up and down the car, in which the tools, etc., of the employees of the

¹ Part of the opinion only is given. — Ed.

road were kept. The car was also used as a place of deposit for lanterns, couplings, etc. The boxes had covers on which persons could sit. The car was, in substance, a store-room, and used for carrying provisions while the train was on the road. These arrangements were made for the convenience of the defendant's servants, and the car, really, carried train equipments. There was no evidence that passengers, either habitually or occasionally (except in the present instance), rode in the caboose. There was a regulation of the defendant, printed on the tables intended for the use of its employees, that passengers were forbidden to ride on coal trains. Disobedience of this rule, if known to the defendant, was followed by a discharge of the employee so offending. Of this regulation the plaintiff had no actual notice, and it was not put up in the "caboose." The plaintiff paid no fare, nor was any demanded of him. The question submitted to the jury at the trial was, whether the plaintiff was informed of the regulation referred to; and they were instructed, that if they should answer that in the negative, the plaintiff could recover. To this direction exception was taken by the defendant.

In considering the effect of these facts, it should be premised that railroad companies, like other common carriers, have a right to make reasonable regulations as to the management of their business. While they may, if they see fit, have the freight and passenger business carried on upon a single train, under one management, they may also completely separate their transactions by arranging them in distinct departments. They may thus have an engineer, brakemen and a conductor, whose duties shall be confined solely to the management of a freight train. Such a conductor, though bearing the same name as the general manager of a passenger train, would have quite different powers. The law would, in general, only confer upon him such authority as was incidental to the business of moving freight; and no power whatever as to the transportation of passengers. This would clearly be the case if a person applying to be a passenger on a freight train had actual notice of the division of the business. In the great transactions of commercial corporations, convenience requires a subdivision of their operations among many different agents. Each of these may have a distinct employment, and become a general agent in his particular department, with no powers beyond it. He is only identified with the principal to that extent. Notice to such an agent would only be notice to the principal in respect to the department in which he acted. (1 Parsons on Contracts, 76 [5th ed.]; see Story on Agency, §§ 17, 167, where the distinction between a strict general agent and one for a particular purpose is considered; see § 131 as to his powers; also, 1 Parsons on Contracts, 76.) These general propositions will scarcely be disputed.

The remaining inquiry is, whether notice to a supposed passenger will not be implied from the nature and apparent division of the business. It would seem so. The matter will be simplified by supposing,

in the outset of the discussion, that this had been a coal train without any "caboose" attached. Under such circumstances, although a wayfarer had taken a gratuitous ride, with the conductor's assent, upon one of the coal vans, happening for the moment to be empty, so that he could improvise a seat, he could scarcely be deemed a passenger, and the defendant, as to him, a carrier. The presumption is that a person on a freight train is not, legally, a passenger; and it lies with him who claims to be one, to take the burden of proof to show that, under the special circumstances of the case, the presumption has been rebutted. So, if a stagecoach proprietor should regularly carry his passengers in a stage and their baggage in a wagon, there would be a fair presumption that the wagon was not intended for passengers, though, under special circumstances, it might be used in that manner. A person asserting that he was a passenger, though riding in the baggage-wagon, would be bound to prove it. In both these cases, the distinction between the passenger and the freight business would be so marked by the external signs of classification, that any person of ordinary prudence would take notice of it. This would be equivalent to actual notice, and the burden of proof would devolve upon him to show that the carrier had relaxed his rule. (*Robertson v. New York and Erie Railroad Co.*, 22 Barb. 91.)

The question now recurs, whether there is anything in the facts of the present case to rebut the presumption which would naturally be derived from the separation of the defendant's coal business from its other transactions. If so, it must be in the authority of the conductor, as a general agent of the defendant, or in the appearance of the caboose as fitted up for the transportation of passengers, or, in the conductor's invitation or suggestion, as to the plaintiff's employment as a brakeman. It is a fallacy to argue that a conductor is a general agent for this purpose, assuming that his power would, as a rule, place him under the class of general agents; he only holds that position for the *management of a freight train*. The fact that the same word, "conductor," is used to designate servants in two kinds of business, which the defendant has made perfectly distinct, tends to confusion. There is no real analogy between the duties of a conductor of a passenger train and those of the manager of a strict freight train. A different class of men would naturally be employed in the two cases. The defendant has a right to assign specific duties to the one distinct from those performed by the other. It is a familiar rule in such a case, that an agent cannot increase his powers by his own acts; they must always be included in the acts or conduct of the principal. (*Marvin v. Wilber*, 52 N. Y. 270, 273.) No act of a conductor of a freight train will bind the company as to carrying passengers, unless the principal in some way assents to it. In the present case, it was distinctly proved that the company forbade the act, and there was no evidence of any form of assent to its exercise, except that which may be inferred from the use of the caboose.

The caboose was not fitted up in the manner usual in passenger cars. Its general appearance showed it to be exclusively designed for the use of the defendant's servants. The plaintiff could not have been misled as he paid no fare. The conclusion is, that there was nothing in the attendant circumstances, in the present instance, to show that the conductor could, by inviting the plaintiff to get upon the train, create between him and the defendant the relation of passenger and carrier.

DICKINSON v. WEST END STREET RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1901.

[177 *Mass.* 365.]

KNOWLTON, J. The question in this case is whether the plaintiff was on the defendant's car as a passenger at the time of the accident, or whether he was at that moment in the service of the defendant, in such a sense that the negligent motorman was his fellow servant.

The defendant had made a rule, "permitting policemen, firemen, advertising agents, news agents and employees of the defendant company in uniform to ride free at any time, such persons being required to ride upon the front platform so far as practicable." At the time of the accident the plaintiff was riding on the front platform under this rule, wearing his uniform. Persons riding gratuitously under this rule are passengers, as well as those who pay their fare. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18. *Doyle v. Fitchburg Railroad*, 162 Mass. 66. *Steamboat New World v. King*, 16 How. 469. *State v. Western Maryland Railroad*, 63 Md. 433. All members of the classes included in the rule stand alike in reference to the duty of care which the defendant owes them, whether they come within one part of the description or another. The rule in reference to employees permits them to ride at any time and place, and for any purpose, if they are in uniform. The reasons in each case for extending this privilege to members of these different classes are not material. Probably they are different in reference to different classes, but they are such as the defendant deems sufficient. So far as employees are concerned, it is enough that, except possibly in regard to wearing uniform, they are given the same rights as others who have no direct connection with the defendant by employment or otherwise.

The question then is, whether at the time of the accident the plaintiff was riding in the full exercise of the rights given by this rule, or whether he was on the car in the performance of his duties as a servant of the defendant, so as to make him at that moment a fellow servant of the motorman. The bill of exceptions answers this question in its statement as follows: his work for the defendant "consisted of

a certain number of trips at fixed and regular times each day; at the time of the accident, he was not on actual duty, but at about noon had finished his work of that morning, got on the first car that came along and was going home to dinner; that he took no part in the management of this car; that he usually had about three hours, between twelve and three o'clock, during which he was not on actual duty, and his time was his own; and he usually returned home about noon to dinner." The car on which he was riding was not on the line on which he was employed.

At the time of the accident he did not stand in the relation of a servant to the defendant. His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval before coming back to his work. This case is different in this particular from cases in which the plaintiff was riding in the line of his duty in the course of his employment. *Gillshannon v. Stony Brook Railroad* 10 Cush. 228. *O'Brien v. Boston & Albany Railroad*, 138 Mass. 387. *McGuirk v. Shattuck*, 160 Mass. 45. *Manville v. Cleveland & Toledo Railroad*, 11 Ohio St. 417. *McNulty v. Pennsylvania Railroad*, 182 Penn. St. 479. His rights were the same as if, after finishing his day's service, he had taken a car in the evening to visit a friend, or to do any business of his own. The fact that he had been in the defendant's service during the day would not make him a fellow servant with the motorman while riding in the evening under the rule, any more than if he had been a policeman or a newsdealer. The case comes within the decision in *Doyle v. Fitchburg Railroad*, 162 Mass. 66. For other cases of similar purport see *Baltimore & Ohio Railroad v. State*, 33 Md. 542; *State v. Western Maryland Railroad*, 63 Md. 433; *Baird v. Pettit*, 70 Penn. St. 477, 483; *McNulty v. Pennsylvania Railroad*, 182 Penn. St. 479; *Packet Co. v. McCue*, 17 Wall. 508; *Morier v. St. Paul, Minneapolis, & Manitoba Railway*, 31 Minn. 351; *Manville v. Cleveland & Toledo Railroad*, 11 Ohio St. 417.

Exceptions sustained.

KILDUFF v. BOSTON ELEVATED RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1907.

[195 Mass. 307.]

MORTON, J. Although at the time of the accident the plaintiff's intestate had finished his work for the day, and was under no obligation to do any more work for the defendant on that day, it seems to us plain that he was being transported by the defendant as an incident

of his employment and that the relation between him and the defendant was therefore that of master and servant and not that of carrier and passenger. The car was a special car in which only the laborers who were working on that particular job were allowed to ride, and was furnished for the mutual accommodation of the company and the laborers, and the plaintiff's intestate paid no fare. The portion of the track where the accident occurred was not open to the public, and transportation over that and the rest of the route was plainly furnished by the defendant to the deceased as a laborer in its employment and not as a passenger. It cannot reasonably be referred to any other relation. *Gillshannon v. Stony Brook Railroad*, 10 Cush. 228. *Seaver v. Boston & Maine Railroad*, 14 Gray, 466. *Gilman v. Eastern Railroad*, 10 Allen, 233. *O'Brien v. Boston & Albany Railroad*, 138 Mass. 387. *McGuirk v. Shattuck*, 160 Mass. 45. *Olsen v. Andrews*, 168 Mass. 261. *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 102. It follows that the negligence complained of was that of a fellow servant and that the plaintiff is not entitled to recover. The case of *Dickinson v. West End Street Railway*, 177 Mass. 365, relied on by the defendant, is clearly distinguishable from the case at bar and more like *Doyle v. Fitchburg Railroad*, 162 Mass. 66.

The conclusion to which we have come on this branch of the case renders it unnecessary to consider the question of the intestate's due care, or the motorman's negligence. *Exceptions overruled.*

TOLEDO, WABASH AND WESTERN RAILWAY *v.* BROOKS.

SUPREME COURT OF ILLINOIS, 1876.

[81 Ill. 245.]

WALKER, J.¹. . . It is urged that the court erred in refusing to give the ninth or some one of the other instructions asked by plaintiff in error, but refused by the court. That instruction asserts, that if deceased knew that the regulations of the company prohibited persons from travelling on the road without a ticket or the payment of fare, and if, after being so informed, he went on the train, and by arrangement with the conductor was travelling without a ticket or paying his fare, deceased, in such case, would not be a passenger, and the company would not be liable for the negligence of their officers. In some form, all these refused instructions present this question.

Defendant in error insists that this case is governed by that of *The Ohio and Mississippi Railroad Co. v. Muhling*, 30 Ill. 9. In that case the passenger had been in the employment of the road, and was neither

¹ Part of the opinion only is given. — ED.

prohibited from getting on the train, or informed that it was against the rules for him to do so without a ticket or the payment of fare. Again, the company, in that case, seems to have owed the plaintiff for labor, which would have enabled them to deduct the amount of fare from the amount owing him. It was there said, that if a person was lawfully on the train, and injuries ensued from the negligence of the employees of the company, the passenger thus injured might recover.

On the part of plaintiff in error it is urged, that railroad companies, being liable for the want of care of their officers by which passengers suffer injury, must have the power to make all reasonable regulations for the government of their employees, and the power to enforce them; that it is a reasonable regulation which prohibits persons from travelling upon their roads without purchasing a ticket or paying fare; that a person going on their road in known violation of such a rule, and by inducing the conductor to violate it, is not lawfully on the road, and the company should not be held responsible for an injury received by such person; that where a person actively participates in the violation of such a rule intentionally and knowingly, he does not occupy the same relation to the road as had he not known of the rule or not done any act to induce its violation.

It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employees of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then, does the act of the person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit. In this case the evidence tends strongly to show that both defendant in error and her husband had money more than sufficient to pay their fare to Danville, and a considerable distance beyond that place. If this be true, and defendant in error swears they had, then they were engaged in a deliberate fraud on the company, no less than by false representations to obtain their passage free from Decatur to Danville, and thus defraud the company out of the sum required to pay their fare. In this there is a broad distinction from *Muhling's* case, as in that case there was no pretence of fraud or wrong on his part. The court below should have given some one of the defendant's instructions which announced the view here expressed.¹

¹ See *Chicago & A. R. R. v. Michie*, 83 Ill. 427; *McNamara v. Ry.*, 61 Minn 296.—*Ed.*

FITZMAURICE *v.* NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1906.

[192 *Mass.* 159.]

SHELDON, J. The plaintiff, while riding upon a train of the defendant, was injured by reason of a collision; and no question is made but that she would have been entitled to a verdict in her favor if she had the rights of a passenger. She was a minor. She was riding upon a three months' season ticket which was good only for students under eighteen years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate purporting to be signed by her father that she was under eighteen years of age and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from the school; and also presenting a certificate purporting to be signed by "J. F. Miner, Principal, Hollander Art School, Boylston St., Boston, Mass.," that she was a pupil in his school, and as he fully believed intended to remain so for the next three months. She was at this time over eighteen years of age, as she testified, lived in Marlborough, and was employed in Hollander's dry goods store in Boston. The regular price for a season ticket was \$32; the reduced rate for students under eighteen years of age, at which the plaintiff procured it, was \$16. She had been riding upon this ticket nearly every day except Sunday for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words, "Good only for a person under eighteen years of age." The jury having found the amount of the plaintiff's damages if she was entitled to recover, the judge ordered a verdict for the defendant, and reported the case to this court, with the stipulation that if she is entitled to recover, judgment is to be entered in her favor for that amount; otherwise, there is to be judgment on the verdict.

The defendant had the right to establish a reduced rate for students under a fixed age. R. L. c. 111, § 228. A statute requiring similar action by street railway companies was sustained by this court in a recent case. *Commonwealth v. Interstate Consolidated Street Railway*, 187 *Mass.* 436. The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practised upon the defendant. She had no right to profit by her fraud; she had no right to rely upon the consent of the railroad

company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly she was not lawfully upon the defendant's train; she was in no better position than that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a person travelling over a railroad on a free pass or a mileage ticket which had been issued to another by name and was not transferable, was barred by his fraudulent conduct from recovering for a personal injury unless it was due to negligence so gross as to show a wilful injury. *Toledo, Wabash & Western Railway v. Beggs*, 85 Ill. 80. *Way v. Chicago, Rock Island & Pacific Railway*, 64 Iowa, 48. If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any wilful or reckless injury. *Condran v. Chicago, Milwaukee & St. Paul Railway*, 67 Fed. Rep. 522. *Toledo, Wabash & Western Railway v. Brooks*, 81 Ill. 245. *Chicago, Burlington & Quincy Railroad v. Mehlsack*, 131 Ill. 61. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practising a fraud. The only relation which existed between the plaintiff and the defendant was induced by her fraud; and, as was said by the court in *Way v. Chicago, Rock Island & Pacific Railway*, *ubi supra*, she cannot be allowed to set up that relation against the defendant as a basis of recovery. See also to the same effect *Godfrey v. Ohio & Mississippi Railway*, 116 Ind. 30; *McVeety v. St. Paul, Minneapolis & Manitoba Railway*, 45 Minn. 268; *McNeill v. Durham & Charlotte Railroad*, 31 Am. & Eng. Railroad Cas. (N. S.) 285.

Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. This simply showed that she had succeeded in carrying her scheme to completion. There had been a similar acceptance by the conductor in *Way v. Chicago, Rock Island & Pacific Railway*, and *Toledo, Wabash & Western Railway v. Beggs*, *ubi supra*. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect; if they knew the facts and acquiesced in the plaintiff's wrongful purpose, this conduct could give her no additional rights. *McVeety v. St. Paul, Minneapolis & Manitoba Railway*, and *Condran v. Chicago, Milwaukee & St. Paul Railway*, *ubi supra*.

The cases relied on by the plaintiff do not support her contention. In *Galveston, Harrisburg & San Antonio Railway v. Snead*, 4 Tex. Civ. App. 31, *Ohio & Mississippi Railroad v. Muhling*, 30 Ill. 9, and *Austin v. Great Western Railway*, L. R. 2 Q. B. 442, no question of fraud was involved. The same is true of *Foulkes v. Metropolitan District Railway*, 4 C. P. D. 267, and 5 C. P. D. 157. In *Doran v. East River Ferry*, 3 Lans. 105, the plaintiff was allowed to recover on the ground that the defendant's servants had negligently failed to demand her fare, and that her injury was due to gross negligence. We have found no

decision which would support a recovery under circumstances like those before us.

The plaintiff's counsel very properly has not contended that there was evidence of any such wanton or reckless conduct as to entitle her to recover in spite of her rights being only those of a trespasser. Bjornquist *v.* Boston & Albany Railroad, 185 Mass. 130. Banks *v.* Braman, 188 Mass. 367.

According to the terms of the report there must be

Judgment on the verdict.

CHAPTER IV.

CONDUCT OF THE UNDERTAKING.

SECTION I. PREPARATION OF FACILITIES.

PHILLIPS *v.* SOUTHERN RAILWAY.

SUPREME COURT OF NORTH CAROLINA, 1899.

[124 N. C. 123.1]

FURCHES, J. On the 15th of December, 1896, the plaintiff, intending to take the next train on defendant's road to Hot Springs, in Madison County, entered the defendant's waiting-room at Asheville about eight o'clock at night, with the intention of remaining there until the departure of the next train on defendant's road for Hot Springs, which would leave at 1.20 o'clock of the next morning. He was informed by defendant's agent, in charge of the waiting-room, that according to the rules of the company, she must close the room and that he would have to get out. The plaintiff protested against this, and refused to leave.

But when the clerk of defendant's baggage department (Graham) came and told him that he could not stay, and made demonstrations as if he would put him out, he left; that he had no place to go where he could be comfortable; that the night was cold; that he was thinly clad and suffered very much from this exposure, and took violent cold therefrom, which ran into a spell of sickness from which his health has been permanently injured.

It was in evidence, and not disputed, that the rules of defendant company required the waiting-room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting-room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until thirty minutes before the departure of defendant's next train at 1.20 o'clock of the next morning. . . .

So the only question that remains is as to whether the defendant had the right to establish the rule for closing the waiting-room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule and that it was a reasonable one. *Webster v. Fitchburg R. Co.*, 161 Mass. 298; 34 At. Rep. 157; 1 Elliott on Railroads, sections 199 and 200; 4 Elliott on Railroads, section 1579.

The case would probably be different in the case of through passen-

¹ Part of the opinion is omitted. — Ed.

gers, and in the case of delayed trains; but if so, these would be exceptions and not the rule.

Waiting-rooms are not a part of the ordinary duties pertaining to the rights of passengers and common carriers. But they are established by carriers as ancillaries to the business of carriers and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error.

New trial.

HALE v. GRAND TRUNK RAILROAD.

SUPREME COURT OF VERMONT, 1888.

[60 Vt. 605; 15 *Atl.* 300.]

ROSS, J.¹ By the agreed case, November 2, 1885, the defendant was operating a railway from Portland, Me., to Canada Line, and had a station at Berlin Falls, N. H. As such it was carrying the mail on its mail trains for the United States government, according to the laws of the United States, and pursuant to the conditions and regulations imposed by the post-office department, at a fixed compensation. The plaintiff, on that evening, in attempting to go to its mail train while stopping at the station at Berlin Falls, for the purpose of mailing some letters, in the exercise of due and proper care, fell from an unguarded and, as he claims, insufficiently lighted platform, leading from the station to the train, and was injured. By the regulations of the post-office department it was then the duty of postal clerks on trains carrying the mail to receive at the cars among other things, from the public, letters on which the postage had been prepaid, and then to sell stamps with which to prepay such postage. Sections 720, 762, Instructions to Railway Postal Clerks. Hence, as a part of the service which the defendant was performing for the government, and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of purchasing stamps and mailing such letters. The plaintiff was a member of the public, and was attempting to pass over the platform provided by the defendant to the mail train, for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government, the defendant became under the duty to furnish him a reasonably safe passage to its mail train, for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose the plaintiff was

¹ The opinion only is given; it sufficiently states the case. — ED.

neither a trespasser, intruder, nor loafer, but was there to transact business, which the defendant had undertaken to do with him, for a compensation received from the government; in fact was there, at the invitation of the defendant, to transact business which it had been hired to perform for and with him, by the government. The duty of the defendant to furnish the plaintiff a reasonably safe passage to its mail train to mail his letters was none the less binding or obligatory because the compensation received therefor came from the government rather than the plaintiff. A. holds a regular passenger ticket over a railroad. The duty of the company operating the road to carry him safely is none the less binding, nor are his legal rights, if injured, in the least abridged because the ticket was paid for by the money of B., rather than with his own money. The government derives a large part of its revenue with which it pays for the mail service by the sale of postage stamps to whomsoever of the public may desire to use that arm of its service. The money which the plaintiff had paid for the postage stamps upon the letters he was carrying, or which he would have paid the postal clerk for stamps to use upon the letters, was indirectly a payment to the defendant for the service which it was about to perform for the plaintiff, in carrying the letters which he was about to post, on the way towards their destination. But whether the plaintiff paid indirectly to the defendant for the service and accommodations which it was under a duty to furnish him, or the government paid therefor, and gave it to the plaintiff, does not vary the defendant's duty to furnish him a reasonably safe passage to the mail car for the purpose of mailing his letters, nor are his legal rights thereby abated. Actionable negligence is a failure in legal duty which occasions an injury to a party free from contributory negligence, or who has not failed in the discharge of his duty in the given circumstances. They have also conceded in the agreed case that the plaintiff exercised due and proper care on the occasion. They only contend that the defendant was under no legal duty to furnish the plaintiff a reasonably safe passage to the mail car, for the purpose of mailing his letters, mainly because he was to pay the defendant nothing therefor directly. But, as we have already endeavored to show, that fact would not relieve the defendant from the duty, inasmuch as it was paid by the government for discharging that duty to the public; that is, to any person who had occasion to go to the mail car when stopping at regular stations to transact any lawful business with the servants of the government. These views would affirm the judgment of the county court, but, in accordance with the stipulation of the parties, that judgment is reversed *pro forma*, with costs to the plaintiff, and the cause remanded for trial.¹

¹ See *Bradford v. Boston & M. R. R.*, 160 Mass. 392, 35 N. E. 1131. — Ed.

PENISTON *v.* CHICAGO, ST. LOUIS, AND NEW ORLEANS
RAILROAD CO.

SUPREME COURT OF INDIANA, 1882.

[34 *La. Ann* 777.]

POCHÉ, J. Plaintiff, a passenger on a train of the defendant from Chicago to New Orleans, was injured while walking from an eating station to her train, on the defendant's road, and has recovered, in this suit, a verdict and judgment for damages in the sum of six thousand dollars.

The evidence is decidedly conflicting, but a careful reading of the record has satisfied us that the following facts are established :

On the 31st of January, 1878, while plaintiff, accompanied by her daughter and her son-in-law, were passengers on a train of the defendant, from Chicago to New Orleans, they came out of their car at about eight o'clock at night, at Hammond Station, then a regular supper station on said road, according to its schedule, for the purpose of taking necessary refreshments.

The building in which meals are served is situated at a considerable distance from the railroad, and is reached by passengers who alight on the main track of the road, by crossing over a side track, and passing on a large platform, and thence through a narrower and covered platform which leads into the hotel.

On the arrival of the train, a torchlight burning on an elevated platform affords ample light to guide the steps of passengers to the covered platform, where two or three lamps light up the way to the interior of the building.

After supper, and on returning to their train, plaintiff and her companions discovered that the torchlight had ceased to burn, and that there was no other light or signals to guide their steps securely through the large platform in front of the hotel to their train, and that there was no officer or employee of the company charged with the duty of pointing out to passengers the way from such platform to their train. Their train, which they had left on the main track, had been removed therefrom and placed on the side track lying next to the hotel, and another train, since arrived, was then occupying the position on the main track, where they had left their train on alighting for supper. They had received no information, officially or otherwise, of those changes, operated while they were in the supper room.

Finding a train on the side track, and believing that to be a new train, which was standing between them and their train, they concluded to go around said former train, so as to reach theirs, and to do so they followed the platform fronting the hotel, and on which there was no

light, and not noticing the termination on said platform on two steps of stairs leading to the main ground, plaintiff, who walked in the lead of her companions, fell to the ground, dislocating her ankle and fracturing her leg in two places, from which she suffered great pain, was confined to her room for four months, was compelled to walk on crutches for eight months, and from which injuries she has not yet recovered the free use of her limb.

Defending under a general denial, the corporation urges its want of responsibility, on the grounds:

1. That the hotel and platform are not the property of the company, but of another person, for whom defendant is in no manner responsible.

2. That the accident occurred through plaintiff's own fault, who should not have attempted to walk around the train on the side track, which was her train, the approach of which, from the eating station, was made easy and safe by lights burning in the covered platform and in a lunch stand situated at the rear end of said gangway, and who should have made inquiries concerning her train.

These propositions involve the discussion of the degree of care, attention, and protection which railroad companies, as common carriers, owe to their passengers.

In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reasonable time for the purpose of sustaining life, by means of food and necessary refreshments. Hence it is, that on all such roads, arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train by employees of the road of the approach of a train to a station where, under arrangements with the company, meals are prepared for the convenience of its passengers.

It is well established in jurisprudence that railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, &c., and it is well settled that any person injured, without fault on his part, by any dereliction of its duty in the premises by a railway company, can recover damages against the corporation for injuries thus received. Cooley on Torts, pp. 605, 606, 642; Addison on Torts, § 245; Shearman & Redfield, p. 327, § 275.

This principle has been applied in a case where a passenger, an old lady, was put out at her destination, at a station where there was no light to guide her steps, and no employee of the company to show her the way out of the station grounds, and was injured in trying to go from the station to a friend's house, by falling from the platform. *Patten v. Chicago & Northwestern R. R. Co.*, 32 Wis. 528.

Under the same rule, a railway company was held responsible for injuries received by a passenger in walking from one of its trains to a transfer boat, by falling on a wharf on which there was not sufficient light. *Beard v. Conn. & Pass. Rivers R. R. Co.*, 48 Vt. 101.

In the enforcement of the same rule, a railway company was mulcted in damages in a case where a lady passenger, alighting from her train at her destination, and finding no safe and convenient platform leading to the highway, attempted to walk across three of the railroad tracks, and falling in a "cattle-guard" filled with snow, was run over and killed by another train of the same company. Hun, N. Y. Reports, vol. 13, 589; see also 56 Me. 244; 16 How. 469.

The obligation of furnishing, by railway companies, safe and easy ingress and egress to and from their platforms, has been extended so as to embrace cases of persons who were not passengers on their roads, but who came on business to their stations, and were injured by means of insufficient or defective platforms, such as a hackman who had transported passengers to a railroad depot. 59 Maine, 183; see also *Jamison v. San Jose R. R. Co.* (California), 11 Reporter; *Law v. Grand Trunk R. R. Co.* (Maine), 12 Reporter, p. 397.

Fully indorsing and concurring with this jurisprudence, we hold that the defendant company is legally bound to furnish to its passengers an easy and safe mode of going to and from its trains, and such eating stations as it may have provided for the wants and convenience of its passengers, and that for the purpose of enforcing this obligation, it is immaterial whether the eating station is owned and kept by the company or by another person, with an understanding with the company as to the time of preparing and furnishing the meals.

In our opinion, this obligation imposes upon the railway company the duty of having ample and sufficient lights, for meals furnished at night, to safely guide their passengers to and from the hotel or eating station, and in case trains are removed from one track to another during the meal, to inform, by employees, the passengers on their egress from the eating or dining room, of the exact location of their respective trains.

We have given due and respectful consideration to the testimony of defendant's witnesses, who state that the platform was sufficiently lighted for all purposes needed by the passengers. These witnesses are the train conductor, two or three other railroad employees, the proprietor of the hotel, his lessee, who keeps it, and the local postmaster, who are all familiar with the place, are there at the arrival of every train, which they all designate by their numbers, are familiar with the rules of the company, and know that during the supper meal the southbound train is moved to the side track from the main track, which is then occupied by the northbound train. It stands to reason that the light which will be sufficient to enable such persons to move about in perfect safety, will not be sufficient to safely guide a stranger, especially a woman who comes from a distant land, is aroused in her sleeping car by the sudden and shrill announcement by a brakeman of "twenty minutes for supper," and alights from her car in the brilliant torchlight, is shown to the hotel by numerous and zealous runners or servants, in great eagerness to secure her patronage, and who lose

sight of her after receiving her money, and now that the torch is out, she is left alone, unaided and unprotected, to grope her way in darkness to her train, which is not now where she left it a few minutes before. Hence, it is but fair, reasonable, and just, to hold the railway company strictly responsible for the injuries which she received in her attempt to discover the location of the train on which she was a passenger.

Under the peculiar circumstances of this case, in which plaintiff is shown to have suffered for months excruciating pains, was forced to great expense in the employment of surgeons and nurses, and is yet in a crippled condition, we are not prepared to say that the verdict of the jury was excessive.

The district judge did not err in overruling defendant's motion for a new trial, urged on the ground of newly discovered evidence, as it appeared that the witness on whose testimony it was based could only corroborate defendant's other witnesses.

The judgment of the lower court is, therefore affirmed with costs.

Rehearing refused.

LEVY, J., absent.¹

LEMERY v. GREAT NORTHERN RAILWAY.

SUPREME COURT OF MINNESOTA, 1901.

[83 Minn. 47.]

BROWN, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The court below directed a verdict for defendant, and plaintiff appeals from an order denying a new trial.

The facts in the case are practically undisputed, and as follows: On June 18 and 19, 1899, defendant ran an excursion train over its line of railroad from Park River, in North Dakota, to Duluth, this state, and return. Plaintiff was a passenger on such excursion, having purchased a round-trip ticket at Park River, his place of residence. The train was divided into two sections, the first section on the return trip being a through train, not stopping at intermediate stations to receive or discharge passengers. On the return to Park River, on June 19, plaintiff was a passenger on the first section of the train. This section was made up of twelve cars — one baggage car, eight day coaches, and three sleeping cars. Between the sleeping cars and the day coaches was a car occupied exclusively by a militia company, and guarded at

¹ Compare: *R. R. v. Orr*, 46 Ark. 182; *R. R. v. Nuswanger*, 41 Kans. 625; *R. R. v. Lucas*, 119 Ind. 583; *Knight v. R. R.*, 56 Me. 234; *Dodge v. Steamboat Co.*, 148 Mass. 207; *R. R. v. Sue*, 25 Neb. 772; *Stewart v. R. R.*, 53 Tex. 289; *Beard v. R. R.*, 27 Vt. 377. — Ed.

each entrance, though it does not appear that passengers were prevented from passing through the car whenever necessary. At the time of entering the train on the return trip plaintiff took a seat in one of the day coaches, but subsequently passed to the rear of the train, through the militia car, into one of the sleepers. When the conductor came into the car collecting fares and taking up tickets, plaintiff discovered that he had lost his ticket, and the conductor required him to pay his fare, which he did. At the time of paying the fare plaintiff demanded of the conductor a receipt for the money. The receipt was not given. The conductor had no blank receipts with him; they being, as he said to plaintiff, at the other end of the train. After paying his fare, plaintiff remained in the sleeping car until the train arrived at Grand Rapids, this state, at which point he left the train to go upon the station platform, and in doing so received the injuries complained of.

His object in leaving the train, as we understand his testimony, was for two purposes: (1) To find the conductor and again demand the receipt for the fare paid him; and (2) to pass around the militia car to enter one of the day coaches, it being, as he now claims, his understanding that he would not be permitted to remain longer in the sleeper, and that the guards would not permit him to pass through the militia car. In alighting at the station, plaintiff fell between the steps of the car and the station platform, — at least, such is his claim, — was shocked and stunned by the fall to such an extent that he was unable to get back upon the train before it started, and in consequence was injured.

Two specific acts of negligence are relied upon to sustain plaintiff's right to action — first, that the defendant failed in its duty to plaintiff as one of its passengers in not having the station platform at Grand Rapids properly lighted at the time of the arrival of the train; and, second, that the station platform was negligently constructed, in that the outer edge thereof was at an unsafe and dangerous distance from the steps of the car. Other acts of negligence pleaded in the complaint are of no consequence or importance, for, unless the evidence establishes a right of recovery upon either of the grounds stated, the plaintiff must fail in the action.

The decisive question in the case resolves itself into one proposition, viz.: What duty did defendant owe plaintiff as a passenger on the train in question with respect to lighting the station platform at Grand Rapids, and with reference to the construction of its station platform at that point? As stated, this section of the excursion train was a through train, and did not stop at points between Duluth and Park River to receive or discharge passengers. It stopped at Grand Rapids for the purpose only of taking water. The trainmen did not announce or call out the station at the time of or before the train came to a standstill. The station platform was unlighted, and was very dark. Plaintiff himself testified that he could not distinguish readily an acquaintance who spoke to him at the car platform. Plaintiff was in no manner, expressly or impliedly, invited to leave the train at the time

he did. There was no occasion, so far as the record discloses, for him to do so, either to obtain a receipt from the conductor, or to enter one of the day coaches. His statement that some one informed him that the conductor left the train at that point has but little weight, inasmuch as he made no inquiry to learn the fact in that regard. At the arrival of the train at this station, the conductor was in the same car with plaintiff, and plaintiff could very readily have made inquiry of him, and also demanded his receipt. Instead of doing so, however, he attempted to alight from the train in the darkness. There is no claim that he had been ordered to leave the sleeping car, nor was he prohibited or prevented from passing through the militia car. He had passed through that car at least twice previous to the arrival of the train at Grand Rapids, and he made no effort to return to the day coach by way of that car.

It is stated as the general rule in *Alabama G. S. Ry. Co. v. Coggins*, 32 C. C. A. 1, 88 Fed. 455, that where a through passenger, without objection by the company or its agents, alights from the train at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, the sending of telegrams, or of exercise by walking up and down the platform, he does not cease to be a passenger, and retains the right to the protection accorded to such by the law.

This rule is sustained by the great weight of authority, and is not controverted by the defendant in this case, except that it contends that it has no application to a through train that does not stop at intermediate stations to receive or discharge passengers. Appellant relies upon the rule to justify his conduct in leaving the train in question. If the rule is to be applied to all trains, whether through or local, it sustains him, and the case should have been sent to the jury, at least this branch of it.

But the rule is not as broad as appellant contends. There must, in the very nature of things, be a distinction between a through train carrying through passengers, and a local train stopping at all stations to receive and discharge passengers. As to the latter there is no question but that passengers may, for any legitimate purpose, alight from the train at any intermediate station at which the train stops to receive and discharge passengers, without relinquishing or abandoning their relation to the company as passengers. But as to a through train, carrying only through passengers, the passenger who leaves the train without the knowledge, consent, or invitation of the company, at an intermediate station at which the train stops only for some purpose in connection with its management and operation, as for the purpose of taking water or coal, and not to receive or discharge passengers, must be deemed to have abandoned his relation as a passenger, and to take upon himself for the time being all risks incident to his movements.

In the case of a local train, the company is bound to know that passengers may be received and discharged at all stations at which a train may stop for that purpose, and is required by the rule to keep the ap-

proaches to the train in a safe condition for their egress and ingress. But as to a through train, there being no passengers to discharge and none to receive, a stopping of the train for some purpose connected with its operation creates no necessity for the exercise of vigilance in the matter of the attention to approaches to the train, and the company should not be held guilty of negligence in failing to do so. Of course, if a passenger leaves a through train with the consent and permission of the company or its agents, it would be the duty of the company to exercise the same degree of care as is required with respect to passengers on local trains.

This was not a local train, but a through train, and the plaintiff was a through passenger. The train did not stop at Grand Rapids to receive or discharge passengers; there was no invitation held out to plaintiff to leave the train at that station; there was no occasion for him to do so; and he must be taken to have assumed all risks incident thereto. There was not only no invitation, express or implied, to passengers to leave the train at this station, but the fact that the station platform was unlighted was in the nature of a warning to them to remain on board.

It is not necessary to consider any other questions in the case. In the view of the law as we have stated it, defendant was not negligent as to the plaintiff in not having the station platform at Grand Rapids properly lighted on the occasion in question, nor was it guilty of negligence as to him because of any defect in the construction of the station platform.

The order appealed from is affirmed.

BREMNER v. WILLIAMS.

COMMON PLEAS, 1824.

[1 C. & P. 414.]

ASSUMPSIT against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

BEST, C. J. The declaration states, that the defendant undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence. The driver said, it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion, that it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. For, when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

*Verdict for the plaintiff—Damages £51.*¹

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. SNYDER.

SUPREME COURT OF INDIANA, 1888.

[117 Ind. 435.²]

ELLIOTT, C. J. The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White River, and the appellee severely injured.

The twenty-second instruction asked by the appellant and refused, reads thus:

¹ Compare: Readhead v. R. R., L. R., 4 Q. B. 379; Carter v. St. R. R., 42 Fed. 37; Sales v. Stage Co., 4 Ia. 547; Ingalls v. Bills, 9 Met. 1; Gilson v. Horse R. R., 76 Mo. 282; Faurish v. Reigle, 11 Gratt. 697. — ED.

² This case is abridged. — ED.

“The court further instructs you that by ‘negligence,’ when used in these instructions, is meant either the failure to do what a reasonable person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances.”

This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character the omission to exercise the highest degree of practical care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use, for the company is bound to test them from time to time to ascertain whether they are being impaired by use or exposure to the elements. *Manser v. Eastern, &c. R. W. Co.*, 3 L. T. (N. S.) 585; *Texas, &c. R. W. Co. v. Suggs*, 62 Texas, 323 (21 Am. & Eng. R. R. Cases, 475); *Stokes v. Eastern, &c. R. W. Co.*, 2 F. & F. 691; *Robinson v. New York, &c. R. R. Co.*, 9 Fed. Rep. 877; *Richardson v. Great Eastern R. W. Co.*, L. R. 10 C. P. 486; s. c. L. R. 1 C. P. Div. 342; *Ingalls v. Bills*, 9 Met. 1; *Funk v. Potter*, 17 Ill. 406; *Bremner v. Williams*, 1 Car. & P. 414; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Alden v. New York Central R. R. Co.*, 26 N. Y. 102.

The decision in the case of *Grand Rapids, &c. R. R. Co. v. Boyd*, 65 Ind. 526, is not in conflict with this doctrine, for in that case an inspection was made.

*Judgment affirmed.*¹

GLEESON v. VIRGINIA MIDLAND RAILROAD CO.

SUPREME COURT OF THE UNITED STATES, 1891.

[140 U. S. 435.]

THIS is an action for damages brought in the Supreme Court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that

¹ Compare: *Grote v. R. R.*, 2 Exch. 251; *Ford v. R. R.*, 2 F. & F. 730; *Wheaton v. R. R.*, 36 Cal. 590; *Hall v. Steamboat Co.*, 13 Conn. 319; *Fuller v. Talbot*, 23 Ill. 357; *McElroy v. R. R.*, 4 Cush. 400; *Carroll v. R. R.*, 58 N. Y. 126. — Ed.

in January, 1882, he was a railway postal clerk, in the service of the United States Post Office Department; that on Sunday, the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Virginia, in a postal car of the defendant, and over its road; that in the course of such run the train was in part derailed by a land slide which occurred in a railway cut, and the postal car in which the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and a letter-box, three of his ribs being broken, and his head on the left side contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind and led to his dismissal from his office, because of his inability to discharge its duties.

Defence was made by the company under these propositions: that the land slide was caused by a rain which had fallen a few hours previous, and therefore was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal car's letter-box, for which the company was not responsible, since he took the risk incident to his employment.

At the close of the testimony, the court having given to the jury certain instructions in accordance with the requests of the plaintiff, charged the jury at defendant's request, as follows:

"I. The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury.

"II. The jury are instructed that the plaintiff, when he took the position of a postal clerk on the railroad, assumed the risk and hazard attached to the position, and if, in the discharge of his duties as such, he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury unless the same were caused by the negligent conduct of the company or its employees.

"III. The court instructs the jury that, whilst a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in any of these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant.

"IV. If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant."

The counsel for the plaintiff objected to the granting of the first of these prayers, and asked the court to modify it by adding the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the company's liability." But the court refused to modify the said prayer, and the plaintiff duly and severally excepted to the granting of each one of said prayers on behalf of the defendant, and to the refusal of the court to modify the said first prayer, as requested. The jury, so instructed, found for the defendant and judgment was rendered accordingly. That judgment having been affirmed by the court in general term, (5 Mackey, 356,) this writ of error was taken.

LAMAR, J.¹ . . . The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary and both are intended for one result; which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land slides and consequent dangerous obstructions to the track itself, from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment. . . .

¹ Part only of the opinion is here given. — ED.

We think the case of the Virginia Central Railroad Co. v. Sanger, 15 Grattan, 230, 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up alongside of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says: "Combining in themselves the ownership, as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers. And as accidents as frequently arise from obstructions on the track, as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See also McElroy v. Nashua & Lowell Railroad, 4 Cush. 400; Hutchinson on Common Carriers, 524; Bennett v. Railroad Co., 102 U. S. 577.

This view of the obligation of the company of course makes it immaterial that the slide was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to *remove* the obstruction, but of negligence in allowing it to get there.

Judgment reversed.

INGALLS v. BILLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1845.

[9 Met. 1.]

HUBBARD, J. The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business which requires their transportation from place to place in vehicles furnished by others; and though speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveller.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage coaches are answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which the greatest care in the examination and inspection of the coach could not guard against, or prevent; or, in other words, whether a coach must be alike free from secret defects, which the owner cannot detect, after the most critical examination, as from those which might, on such an examination, be discovered.

The learned judge ruled, that the defendants, as proprietors of a

coach, were bound by law, and by an implied promise on their part, to provide a coach, not only apparently but really roadworthy, and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine, as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment. Goods are entrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been, and still are, held responsible for the safe delivery of the goods, with but two exceptions, viz. the act of God and the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts and embezzlements, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied; and for the obvious reason, that a great distinction exists between persons and goods, the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight, in the maintenance of their rights, which the owners of goods cannot do, who have entrusted them to others.

It is contended by the counsel for the plaintiff, that the proprietor of a stage coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is roadworthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest care, caution, and diligence, in the selecting of the coach, and in the preservation of it during its use, will not be a defence to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon, are those of *Israel v. Clark*, 4 Esp. R. 259; *Crofts v. Waterhouse*, 3 Bing. 319; *Bremner v. Williams*, 1 Car. & P. 414; and *Sharp v. Grey*, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of established authorities. But we think, upon an examination of them and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff, as has been argued.

It must be borne in mind, that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches, for the loss of goods, as early as the time of Lord Holt, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of *White v. Boulton*, Peake's Cas. 81. which was tried before Lord Kenyon in 1791, and published in 1795. That was an action against the proprietors of the Chester mail

coach for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord Kenyon, in delivering his opinion, said, "when these [mail] coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion cannot be doubted, in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of *Aston v. Heaven*, 2 Esp. R. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage coach, for negligence in the driving of their coach, in consequence of which it was upset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach owners were liable in all cases, except where the injury happens from the act of God or of the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons, the action stands alone on the ground of negligence.

The next case was that of *Israel v. Clark*, 4 Esp. R. 259, in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axletree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the cause, assented, and said, "if they carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the present case was neither discussed nor started, viz. whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions, in the terms "landworthiness in the carriage," than he in

tended by the thought of seaworthiness in a ship, and the duty of ship owners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of *Christie v. Griggs*, 2 Campb. 79, in 1809. There the axletree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said, "as the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of *Bremner v. Williams*, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There, Best, C. J. said he considered that "every coach proprietor warrants to the public that his stage coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so, in *Crofts v. Waterhouse*, 3 Bing. 321, in 1825, Best, C. J. said, "the coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet Park, J. in the same case said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned judge, (Best,) in the case of *Harris v. Costar*, 1 Car. & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff *safely*. The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all the other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of *Sharp v. Grey*, 9 Bing. 457, where the axletree of a coach was broken and the plaintiff injured. There the axle was an iron bar enclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. Gaselee, J. held that "the burthen lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J. said, "the chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequence, upon the same principle as a ship owner who furnishes a vessel which is not seaworthy." And Alderson, J. said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. But we incline to believe the learned judges gave too much weight to the comparison of Bosanquet, J., viz. that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches, and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as

the vehicle is concerned. But that the case of *Sharp v. Grey* is susceptible of being placed on the ground which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says, "this was entirely a question of fact. It is clear that there was a defect in the axletree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not." And Tindal, C. J. who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also *Bretherton v. Wood*, 3 Brod. & Bing. 54, and 6 Moore, 141. *Ansell v. Waterhouse*, 6 M. & S. 385, and 2 Chit. R. 1.

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. 626, the court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of *Hollister v. Nowlen*, 19 Wend. 236, they say, that "stage coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies."

In a case which occurred in respect to the transportation of slaves, (*Boyce v. Anderson*, 2 Pet. 155,) Chief Justice Marshall, in giving the opinion of the court, says, "the law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to *new cases*. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of *Stokes v. Saltonstall*, 13 Pet. 181, the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his *Treatise on Bailments*, §§ 592-600, with his usual learning; and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and, though given at *visi prius*, are fully sustained by the discussions which the same subject

has undergone in the courts of our own country. We have said, as being most consonant with sound reason, or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and — from the number of artisans employed in the construction of the materials of a single coach — whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency and adaptation of his own manufactures to the uses designed — which, in a community like ours, could not be practically enforced — the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said that the same observations might be applied to ship owners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods entrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the evils are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present

case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed in the argument; and we see no reason to doubt its correctness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable. *Jones v. Boyce*, 1 Stark. R. 493.

New trial granted.

McPADDEN v. NEW YORK CENTRAL RAILROAD.

COMMISSION OF APPEALS, NEW YORK, 1871.

[44 N. Y. 478.]

APPEAL from a decision of the General Term of the Supreme Court in the seventh district, upon exceptions there heard in the first instance, granting a new trial.

This action was brought to recover for injuries sustained by the plaintiff, while a passenger upon the defendant's road. The cause was tried at the Rochester circuit, in January, 1865; and it appeared, among other things, that, on the 5th day of January, 1864, the plaintiff took passage on a train at Rochester going westerly, intending to go to Knowlesville. The train stopped at Brockport, and there met a train coming east. About half a mile west of Brockport the two passenger cars of the train going west were thrown from the track, and the car in which the plaintiff was riding was overturned, and he was injured. The train going west was not under full headway, going at the rate of about twenty-five miles per hour. The train going east passed the place of the accident at the rate of twenty-five to thirty miles per hour.

The accident was caused by a broken rail, a piece of the rail, about four feet in length, being broken in three or four pieces. All the witnesses who testified upon the subject testified that the rail was a good, sound and perfect rail, and in all respects properly placed and fastened, and they attributed the breaking to the coldness of the weather, it being a very cold morning. A track watchman went over the track three miles west of Brockport, starting at three o'clock that morning, and a train followed him west in about an hour. He then returned over the road to Brockport, reaching there a little before six o'clock, a short time before the accident. After the train passed east, he had no time to go over the road again before this train went west. When he went over the road, he found it in order. The plaintiff's witnesses testified that all the cars were off from the track but the locomotive. The defendant's witnesses testified that the passenger cars and the hind wheels of the baggage car were off the track. The conductor and

engineer of the train going eastward testified that they did not notice any jolt, at the place of the accident, of their train, and that, if the rail had been broken and displaced by their train, they would have noticed it. The engineer of the train going west testified that he did not discover that any rail was displaced, and would have discovered it, if one had been displaced, before his engine passed over; and the conductor of this train testified that he could feel the jog when a rail was displaced. This testimony of the conductors and engineers was uncontradicted.

At the close of the evidence, the counsel for the defendant moved for a nonsuit, upon the ground that there was no proof of negligence or omission of duty on the part of the defendant, but that there was clear evidence that every precaution to insure safety to passengers had been taken. The counsel for the plaintiff then asked to go to the jury upon the question whether the rail was broken before the train going west came upon it. The court refused permission to him to do so, and nonsuited the plaintiff, and his counsel excepted, but did not request to go to the jury upon any other question.

The General Term made an order granting a new trial, and the defendant appealed from such order to this court, stipulating for judgment absolute in case the order should be affirmed.

The case below is reported, 47 Barbour, 247.

EARL, C. The General Term granted a new trial, upon the ground that the judge, at the circuit, should have submitted to the jury the question, whether the rail was broken before it was reached by the train going west carrying the plaintiff; and it held, if it was thus broken, that the defendant was liable, irrespective of any question of negligence, within the principle of the case of *Alden v. The N. Y. C. & R. Co.* (26 N. Y., 102), upon the ground that it was bound to furnish a road adapted to the safe passage of trains, or in other words "a vehicle-worthy road."

I am obliged to differ with the General Term, for two reasons; 1st. If the rail was broken before it was reached by the train going west, it must have been broken by the train going east shortly before, and there is no evidence whatever that it was broken by that train. All the evidence tends to show that it was broken by the train going west. Such is the evidence of the conductors and engineers of both trains. There is no presumption that the rail was broken before this train reached it. It is unquestioned that the accident was caused by the broken rail, and if the plaintiff claimed that the defendant was liable, because the rail was broken before the train upon which he was riding reached it, it was incumbent upon him to prove it. This he failed to do; and if the jury upon the evidence had found it, it would have been the duty of the court to set the verdict aside as against the evidence.

But there is another reason. It does not appear that plaintiff's coun-

sel, upon the trial, claimed that he had shown any negligence against the defendant, and he did not claim to go to the jury upon any such question, and the General Term did not grant a new trial upon the ground that there was any question of negligence in the case, which ought to have been submitted to the jury, but upon the ground above stated.

In the case of *Alden v. The New York Central Railroad Company*, the accident, by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide roadworthy vehicles, and that the defendant was liable for the plaintiff's injuries caused by a crack in the axle, although the defect could not have been discovered by any practicable mode of examination. That case was a departure from every prior decision and authority to be found in the books of this country or England, and, so far as I can learn, has never been followed anywhere out of this State. It was in conflict with the previous case, in the same court, of *Hegeman v. The Western Railroad Corporation* (3 Kern., 9). The only authority cited to sustain the decision was the English case of *Sharp v. Grey* (9 Bing., 457), and yet the decision has been distinctly repudiated in England, in the well considered case of *Readhead v. Midland Railway Co.*, first decided in the Queen's Bench (Law Reports, 2 Q. B., 412), and then on appeal in the Exchequer Chamber (Law Reports, 4 Q. B., 379), where it was unanimously affirmed in 1869; and the court held that the contract, made by a common carrier of passengers for hire, with a passenger, is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and that it does not contain or imply a warranty that the carriage in which he travels shall be in all respects perfect for its purpose and roadworthy. In the Exchequer Chamber, Mr. Justice SMITH, writing the opinion of the court, alludes to the case of *Alden v. The New York Central Railroad Company*, and dissents from it, and comments upon the case of *Sharp v. Grey*, relied upon in that case, and he shows clearly that it was no authority for the broad doctrine laid down in that case. He says: "We have referred somewhat fully to this case (*Sharp v. Grey*), because it was put forward as the strongest authority in support of the plaintiff's claim, which can be found in the English courts, and because it was relied on by the judges of the Court of Appeals, in New York, in a decision which will be afterward referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision." Hence the case of *Alden v. The New York Central Railroad Company* has no foundation of authority whatever to rest on, and the only reason given for the decision is that the new rule adopted would be plainer and easier of application than the one that had been recognized and acted upon for hundreds of years. It was always supposed that there

was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the common carrier of passengers. The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.

I have thus commented upon and alluded to the case of *Alden v. The New York Central Railroad Company*, with no design to repudiate it as authority, but for the purpose of claiming that it is a decision which should not be extended. I am unwilling to apply it to every case that apparently comes within its principle; nor would I limit it to the car in which the passenger was riding. The whole train must be regarded as the vehicle; and the engine and all the cars attached together must be free from defect and roadworthy, irrespective of negligence. So far, and no farther, am I willing to regard that case as authority. Shall it be applied to steamboats and vessels, common carriers of passengers upon the ocean and our inland waters? Shall it apply to innkeepers, proprietors of theatres and other places of public resort, who invite the public into their buildings, for a compensation? And shall all such persons be held to an implied warranty that their buildings, with the appurtenances, are suitable and proper, and free from all defects which no foresight could guard against or skill detect? Shall it be applied to the roadbed of a railroad? If so applied, where shall it stop? It must also extend to the bridges, masonry, signals, and, in fact, to all the different parts of the system employed and used in the transport of passengers by railroad. And, as railroad companies are responsible for the skill and care of all their human agents, such an extension of that decision would make them substantial insurers of the safety of all their passengers, and thus practically abolish the distinction between the liability of the carriers of passengers and the carriers of goods. While such a rule would "be plain and easy of application," I am not satisfied that it would be either wise or just. Railroads are great public improvements, beneficial to the owners, and highly useful to the public. There is a certain amount of risk incident to railroad travel, which the traveller knowingly assumes; and public policy is fully satisfied, when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travellers.

If, therefore, the jury had found that the rail was broken by the eastward bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable.

I am, therefore, in favor of reversing the order of the General Term, and ordering judgment upon the nonsuit for the defendant, with costs.

LORT, Ch. C. Assuming that it was the duty of the defendant, within the principle of *Alden v. The New York Central Railroad Com-*

pany (26 N. Y. Rep., 102), as stated in the opinion of the court below, "to provide a road adapted to the safe passage of the vehicle used over it, a road of continuous, unbroken rails for each and every train to enter upon, in its passage over the road," irrespective of any question of negligence (but as to which it is unnecessary to express an opinion), I am, nevertheless, of opinion, on a careful examination of the testimony in this case, that the plaintiff was properly nonsuited. It was shown by undisputed evidence, of witnesses competent to judge, that the rail in question was, previous to its being broken, a sound rail of the usual and a good size and of good, sound and solid iron, and that the breaks were new and perfectly bright, and no fracture or crack was discovered in the pieces that were broken off, that the end of the rail made a good joint, was perfect, not battered down, and in good order, that the chair was good, that the ties were good, sufficiently thick to support the rail, that there was a sufficient number of them, that they were sufficiently close together to give a good bearing for the rail, that the road was well ballasted with gravel around the ties.

This accident occurred early on the morning of the 5th day of January, 1864, about half a mile west of Brockport, and it was shown that the morning was very cold, that good and perfectly sound rails will break in cold weather when the track is in perfect order, and it was testified, by several witnesses, having experience as engineers on railroads, that they knew of no way of preventing it.

It also appeared by the evidence that a train from the west, called Wells' train, going east, came down and stopped at Brockport a few minutes before the train, on which the plaintiff was, went up, and that the two trains met at that place.

The night watchman on that section of the road testified, that he had, on the morning of the accident, left the depot at the Brockport station and went west about three o'clock, that a train followed him west about four o'clock, that he went three miles west and came back over the place of the accident a little before six o'clock; that he went over the track, carrying a lamp with him, to see if every thing was clear, and to see if any rails were broken or misplaced; that he walked in the middle of the track, looking at both tracks, examined the rails and found the track all right; that about an hour after he came down, the Wells' train, before referred to, came down, and there was no time to pass over the road again before the other train went up. The conductor on the Wells' train testified, that he had been engaged on railroads twenty-two years; that his engine and cars were in good order, and that if there had been a rail displaced he would have noticed it by the jolt.

The engineer on that train testified, that he did not notice any jolt; that if a rail had been broken and displaced, he would have noticed the jolt; that there was nothing on the track to prevent his seeing it, and if a rail had been displaced or a piece broken out he would have discovered it: that his train ran about twenty-five miles an hour, and that twenty-five or thirty miles an hour was safe running time.

The engineer of the train going west, and on which the plaintiff was a passenger, testified that he left Rochester about five o'clock in the morning; that the cars were in good order; that he did not discover any break in the rail; that he would detect a broken rail, if displaced in the track; that he did not discover anything wrong in passing over the point where the accident occurred with his engine, and that there was no indication of a broken rail as he passed over that point; that the first notice he had of it was by the ringing of the bell; then, on looking back, he saw that two coaches had gone off the track, and one of them was overturned; that the engine did not leave the track, and that the hind wheel of the baggage car was off; that the train was at the time running twenty or twenty-five miles an hour, not to exceed twenty-five miles.

The conductor of that train stated that he was in the rear car of the train at the time of the accident; he testified that it was running at a rate not exceeding twenty-five miles an hour, and that it was not under full headway; that the engine did not leave the track; that there was no broken rail within three feet of the last car; that when a rail is displaced he can feel the jog.

No testimony was introduced to contradict or impeach the evidence to which I have referred, and after all the testimony was given, the case states that thereupon the counsel for the defendant moved for a nonsuit, "on the ground that there was no proof of negligence or omission of duty, but clear evidence that every precaution to insure safety to passengers had been taken by the defendant. The counsel for the plaintiff then asked to go to the jury upon the question whether the rail was broken before the train going west, upon which the plaintiff was, came upon it. The court refused permission so to do, and the counsel for the plaintiff excepted. The court then, on motion of the counsel for the defendant, nonsuited the plaintiff, and the counsel for plaintiff excepted." The request of the counsel to go to the jury on the single question "whether the rail was broken before the train going west, upon which the plaintiff was, came upon it," concedes all the ground on which the nonsuit was asked, except that. All the evidence bearing on the question negated that fact. The testimony of the watchman and the engineers justified the conclusion, and none other, that the rail was not broken when the engine of the train in question entered upon and passed over it, and there was nothing shown which would have warranted the jury in finding that it was; and a verdict in favor of the plaintiff on that question would have properly been set aside, as against evidence and without any proof whatever to sustain it.

It follows from these views that the order granting a new trial was erroneous, and must be reversed, with costs, and the defendant is entitled to a judgment on the nonsuit ordered, with costs.

LEONARD, C. This case is distinguished from that of *Alden v. The New York Central Railroad Company* (26 N. Y., 102). In that case

there was a defect in the axle, which caused the break. It could not have been discovered without removing the wheel. The Court of Appeals held that the difficulty of discovering the defect did not excuse it. The fact that the defect existed was enough, and in case of an injury caused thereby the company was held to be liable. It appeared that there was a test, which might have been applied in the construction, which would have developed the crack or flaw in the iron where it broke. (*Hegeman v. The Western Railroad*, 3 Kern., 9.)

Bending the axle, while in the process of construction, would have led to a discovery of the crack or flaw. This established negligence on the part of the company. There was no defect in the iron of the track in the case under consideration. There was no dispute on this point. The iron was good, and no crack or flaw appeared. The break was caused by the exceeding cold weather. This was the result of a *vis major*, against which no prudence could have guarded. But it is said that the break may have existed from the time the previous train going easterly passed over the track (some few minutes prior to the accident), and that if this was so, as the jury might from the evidence have found, that this case would then be brought within the principle of the case of Alden (26 N. Y. R.), before referred to. If the fact should be so found, it is contended that the track was for a few minutes in a broken condition, incapable of serving the purpose of its construction, from which the company would be liable in case of an injury.

This position is not sound, for the reason that the evidence is also uncontradicted, that the track had just been examined prior to the passing of the train going easterly, and found to be in good condition; and it was impossible for another examination to have been made before the train which carried the plaintiff reached the point where the accident occurred.

It has been said that the case of Alden (*supra*) holds, substantially, that the railroad company guaranty that their road and all its appointments are perfect or without defect. It may be, that liability for a defect which the company could not discover by any diligence, short of taking the machine to pieces or destroying it, amounts to a guaranty of perfection, as claimed. The principle of negligence is still the foundation of the liability.

In the present case no defect existed, or if it did exist for a few minutes, no human diligence or foresight could have discovered or prevented it. An impossibility is not demanded by the law, nor by the decision in Alden's case. The defect existed there, and it might have been discovered and prevented by attention and examination, or by the application of all the tests known to skill and science in the construction of the axle. Its omission was negligence, for which the company were held to be liable. It was no impossibility which was there demanded. Here the demand would have that extent before the liability for damages could be held to apply. The case of Alden imposes no new rule not before known to the law. It holds that the carrier of passengers is

guilty of negligence, if there is any defect in the vehicle by which they are carried and an injury occurs thereby. The existence of such a defect is so held, as matter of law, if it could have been discovered or remedied by any possible care, skill or foresight. The facts before the court in that case authorized no other deduction or conclusion.

It is the same principle applied in *Sharp v. Grey* (9 Bing., 457), where the court held that the carriage, used for carrying passengers, must be roadworthy; that is, if there is any defect which might, by any care or foresight, have been prevented, from which a personal injury occurs, it is negligence as matter of law. Some defect has been proven to have existed in every case where a liability has been imposed for a personal injury, and the existence of the defect was attributed to a want of such care or foresight as might have prevented it. When a passenger travels by a ship, whether navigated by sails or steam, or travels by coach or rail-car, or any other public conveyance, he expects to take, and does take, the hazard of such accidents as may occur to him without any want of care or diligence on the part of the carrier. The carrier is not liable for an injury to a passenger by the action of the elements, where no care or foresight, skill or science, could have guarded against the accident which occasioned it.

The nonsuit was properly granted, and the General Term were in error, and must be reversed.

Order of the General Term reversed, with costs, and judgment upon the nonsuit ordered, with costs. HUNT, C., dissenting.

SMITH *v.* NEW HAVEN AND NORTHAMPTON RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1866.

[12 *All.* 531.]

FOSTER, J.¹ In this action against a railroad company for injuries received by cattle while being transported to market, it appeared that, when the train arrived at Westfield, the barriers of a car door were found to be broken down and three of the cattle were missing.

The defendants requested the presiding judge to rule that if the corporation used due care, and the injury was occasioned by the unruliness of the cattle, the plaintiff could not recover. This instruction was properly refused.

The common law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property. *Wilson v. Hamilton*, 4 Ohio (N. S.), 722. *Palmer*

¹ Part of the opinion only is given. — ED.

v. Grand Junction Railway, 4 M. & W. 749. *White v. Winnisimmet Co.*, 7 Cush. 155.

To this general rule there is an apparent exception, supported by authority and which we adopt, that the liability of the carrier does not extend to injuries caused by the peculiar character and propensities of the animals to themselves or each other. Perhaps this qualification is in principle only an application to live freight of the familiar rule which relieves the carrier from responsibility where fruit perishes by natural decay, or the inherent defects of merchandise destroy its value. Although the carrier insures the arrival of the property at the point of destination against everything but "the act of God and of public enemies," yet the condition in which it shall arrive there must depend on the nature of the article to be transported. He does not absolutely warrant live freight against the consequences of its own vitality. *Hall v. Renfro*, 3 Met. (Ky.) 51. *Clarke v. Rochester & Syracuse Railroad*, 4 Kernan, 570.

Vicious and unruly animals may injure or destroy themselves or each other; or frightened animals may die of terror or starve themselves by refusing food, notwithstanding every precaution it is possible to use. For such occurrences the carrier is not answerable. He will be relieved from responsibility for casualties of this description, if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires. In arrangements and precautions to guard against injuries occasioned by the faults and vices of animals to themselves or each other, the carrier is bound to use an amount of diligence analogous to that required of passenger carriers in the transportation of human beings. But the sufficiency of a car door to resist the struggles of animals, however unruly, it is in the power of a railroad company to secure. And its obligation in this respect is not satisfied by furnishing a reasonably strong car. The company is bound to have one absolutely and actually sufficient. It is practicable to make a car so thoroughly strong that cattle cannot break it down and fall out. For any failure to do so the carrier is responsible.

THE NORTHERN BELLE.

SUPREME COURT OF THE UNITED STATES, 1870.

[9 Wall. 526.]

APPEAL from the Circuit Court for Wisconsin, the case being this:

The La Crosse and Minnesota Steam Packet Company, owners of the steamboat Northern Belle, and engaged in the carrying trade on the Upper Mississippi, undertook to carry for a certain Robson, in their barge Pat Brady, five thousand bushels of wheat from Hastings,

in Minnesota, to La Crosse, in Wisconsin, and safely deliver the same, the unavoidable dangers of the river and fire only excepted. On the voyage the barge was sunk and the wheat damaged, and the Home Insurance Company, which had given a policy on the wheat and paid it, filed a libel in admiralty against the steamer and her barge, to recover the loss. The principal question in issue was the seaworthiness of the barge. The injury occurred May 12th. About the latter part of June following, after another accident and loss of a cargo on the same barge, she was placed upon the ways for repairs. And the depositions of several witnesses who examined her carefully at this time were now before the court. One of these witnesses testified that he found over ninety timbers rotted and gone, so much so that they were not strong enough to make a fastening to. At one point there were four side timbers rotted out, so as to leave about five feet without support. Her floor-timber ends were much decayed. Another witness stated that on one side he found about fifty rotted timbers, some of them entirely rotted off; on the other side about the same, fifteen or twenty of them rotted entirely off. A third witness, a ship carpenter, confirmed this, testifying that the effect of it would be that any strong pressure against her sides or bottom, from getting aground or surging against a steamboat, would cause her to leak; an inference which it hardly needed a ship carpenter to draw for the court.

The evidence in the immediate case showed that on the occasion when the present catastrophe took place, the steamboat was descending the river in the night, when a slight shock was felt on the barge, so slight that it was not communicated to the boat. It did not stop or retard either the barge or the boat, but in a few minutes the former was found to be sinking, and had to be grounded on the nearest sand-bar. No rock or snag was proved to be in the river at the place where the shock first occurred.

The Pat Brady was an old barge which had been formerly called Fort Snelling. But about a year before this catastrophe, she had been repaired and sent forth with a new name.

The District Court decreed in favor of the libellant, and the Circuit Court affirmed that decree. The case was now brought here by the packet company.

MR. JUSTICE MILLER delivered the opinion of the court.

As the decision of the cause turns upon the fitness of the barge for the purpose of the voyage, or, in the language of the admiralty, on its seaworthiness (a question which, as applicable to the peculiar condition of this navigation, is before us for the first time), we propose to examine into some of the principles on which that question must be decided.

For many years the grain which was transported by steamboats on the Western rivers was first put in sacks, and then placed in the hold of the vessel, or if that was filled, was laid around on the decks. But as this commerce in the cereals increased in importance, including, as it does, the wheat, corn, rye, oats, barley, &c., of that immense agricul-

tural region, it became a necessity to have the freight as cheap as possible. The cost of the sacks in which the grain was carried, and the labor of filling and securing them, and loading and unloading, was a heavy item in transportation. The railroads, which had become active competitors for this carrying trade, did not use sacks, but placed the grain in bulk in cars adapted to the purpose. To facilitate the loading and unloading of grain these railroad companies introduced on their lines, and at the termini of their roads on the rivers, immense buildings called grain elevators. In these buildings the grain was carried by machinery up into bins, and then by its own gravity let down through conductors into the cars, which were thus loaded in a few minutes. The introduction of this mode of loading and carrying grain by the railroads, and the competition which they presented to river transportation, introduced in the latter the use of barges, in which grain was carried in bulk, without sacks, and loaded from elevators, as was done by the railroads. This mode of river transportation, which is often auxiliary to the railroads, has superseded almost entirely the old mode of carrying by sacks in the hold of the vessel, and its present importance and future growth can hardly be overestimated. It is, therefore, of great consequence to determine, upon sound principles, the rights and liabilities of the carrier and the owner of the cargo in these cases, in regard to these barges, so far as they are open for consideration.

The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and making part of the particular boat in connection with which they are used; though quite often an individual or corporation owning several boats, running in a particular trade, have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.

The question that arises in the case before us has reference to the extent of the duty or obligation which the law imposes upon the owners of such a steamboat in regard to the condition of the barge in which grain is so carried in bulk, as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire.

This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it.

When we come to consider what shall constitute fitness or unfitness for the voyage we must take into account the nature of the service

which she is to perform, and the dangers attending the navigation in which she is engaged. This is very different in the narrow current and shallow water of the river from what it is in open seas or lakes or their bays and inlets. The necessities of river navigation require steamboats and barges to pass through narrow and crooked channels, and to venture on very shallow water, a water which is constantly varying in its depth, and a channel which often changes its course in a few days very materially. The consequence of this is that both steamboats and barges often get aground temporarily and are soon got off and resume their voyage. Often they rub the bottom of the river for many feet on crossing a sand-bar at low water, and pass on without injury or interruption. These large steamboats, having a barge or barges in tow, lashed to them loosely, as they must be, are often brought against their sides with much force. They land for the purposes of their ordinary business at every ten or twelve miles of their voyage at the towns and landings on the river, and in doing so must necessarily impinge with more or less force against the barge which is between the boat and the shore. These are the daily and hourly external forces to which the barge is subjected in the ordinary course of navigation.

It is the duty of the carrier to see that his barge is capable of resisting these forces without subjecting the cargo to injury. She must be so tight that the water will not reach the cargo, so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this she is seaworthy; if she is not, she is unfit for the navigation of the river. No other test can be given, and this must be determined by the facts in each particular case.

In the one now under consideration, if regard be had to the evidence as to the condition of the *Pat Brady*, there is not much difficulty. [The learned Justice here recapitulated the testimony as already given as to the condition of the boat.] It is argued by the claimants that the barge struck a sunken rock or snag with such force as to tear open her planks, and that the sinking was one of the unavoidable dangers of the river. But without attempting any nice criticism of that phrase, we are entirely satisfied that there was no shock or force which a strong, well built barge would not have sustained without injury. The slight character of the shock, the rotten condition of the barge, the additional fact that she was an old barge which had been repaired and had her name changed a year or so before the accident, all prove this. No snag or rock was proved to exist there. It was, in all probability, an ordinary rub over a sand-bar, which the barge, in her decayed condition, could not stand without leaking.

Decree affirmed.

LOOMIS v. LEHIGH VALLEY RAILROAD.

COURT OF APPEALS, NEW YORK, 1913.

[Reported 208 N. Y. 312.]

WERNER, J. The first question to be considered is whether, independently of the federal and State statutes, the defendant was subject to a common-law duty to its shippers to furnish them cars equipped with bin doors or bulkheads for the shipment of grain and other produce in bulk. This question need not be discussed at length. It is the settled law that a common carrier must provide itself with vehicles which are safe and sufficient for the purpose intended. (Hutchinson on Carriers, § 497; *Cin., N. O. & T. P. Ry. Co. v. Fairbanks & Co.* 90 Fed. Rep. 467; *Chicago & Alton R. R. Co. v. Davis*, 159 Ill. 53.) We are not now considering the matter of rates, tariffs or regulatory legislation, but the primary duty of the carrier to do that which he undertakes to do. When a carrier solicits and receives produce for shipment in bulk, the law implies the obligation to furnish cars which are reasonably fit for that service; and when the carrier fails in that duty, to the damage of the shipper, the latter may ordinarily invoke his remedy at law to recover the loss which results from the dereliction of the former. There are instances, however, in which the predicament of the shipper and the degree of the carrier's dereliction are elements to be considered in determining the remedy to be applied. When the shipper brings his produce to a country station, where there are no facilities for storage, and discovers that the carrier has furnished cars which are not fit for their intended service, but which can be made so by a trifling expenditure of labor and money, it is but reasonable that the shipper should be permitted, for the advantage of both, to perform the initial duty of the carrier, and charge it with the fair expense. Any other course would entail upon both unnecessary hardship and loss. The carrier could be mulcted in damages out of all proportion to its slight infraction of duty, and the shipper subjected to losses, under his contracts with others, not within the scope of the carrier's agreement, and thus irremediable. These considerations, and others of mutual convenience, are doubtless responsible for the long standing and practically universal custom in this part of the country of permitting the shippers of grain and produce in bulk to equip cars furnished for such service with the necessary bin doors or bulkheads when the carrier has failed to do so. The record discloses that for many years prior to 1906 it had been the custom for the defendant and of other railroads in this State to furnish shippers of grain and produce in bulk the lumber with which to convert ordinary freight cars into suitable conveyances for such

shipments, and that without the addition of bin doors or bulkheads such cars are not suitable for the service. It appears that they cannot be loaded to the minimum capacity upon which the freight rate is based, or the maximum which, in the interest of the shipper, they are designed to hold. If the shipment happens to be grain, the load naturally gravitates to the level at the car doors, where the pressure may create a space through which the load is jolted out in transit. And in unloading there is also a degree of waste and inconvenience, because a car laden with grain or other loose produce, and not equipped with bin doors or bulkheads, cannot be opened without spilling some of its contents. As to the shipments set forth in the schedule annexed to the complaint, the defendant refused, after demand by the plaintiffs, to equip its cars with the necessary appliances. Without them the cars were practically useless. We think that, in these circumstances, the plaintiffs were justified in furnishing the necessary lumber, and that for the concededly reasonable expense incurred by them they are entitled to recover from the defendant, unless the provisions of our Public Service Commissions Law or of the Interstate Commerce Act have established a different rule.

[The court then held that in case of an interstate shipment the Interstate Commerce Act and its amendments had superseded the common law.]

PATTERSON v. OLD DOMINION STEAMSHIP CO.

SUPREME COURT OF NORTH CAROLINA, 1906.

[140 N. C. 412.]

CLARK, C. J. The plaintiff's evidence is that he purchased his ticket and with three friends was first to apply at the purser's office for berths, and requested a state-room for the four, containing four berths. Two of his friends were given berths in this room, together with two strangers who applied after the plaintiff. The plaintiff and one of his friends were refused a state-room and berth altogether, and they were compelled to sit up all night. The defendant was applied to by the plaintiff for a berth when he bought his ticket, but the defendant refused to supply state-rooms or berths until after the ship had left the dock and was in midstream.

If, as is presumably the case on a steamer running at night, a berth is a reasonable and proper accommodation, the defendant is liable for failure to furnish it, unless the fact that none can be had is made known to the passenger who chooses to ask for a berth when he buys his ticket. The defendant should have had its office for berths open when it sold its tickets. It was its duty to sell tickets to applicants in the order in which they were applied for, without discrimination, till the full number was sold to the passengers whom it could carry comfortably, and the same is true as to the sale of its berths. If its berth and state-room accommodations are exhausted when a ticket is asked for, the intending passenger on learning that fact may defer his trip till another time, or may go by another route rather than sit up all night. It is an imposition upon the travelling public to withhold information as to the lack of a sufficient number of berths till after the passage ticket is paid for, and the passenger has embarked and the vessel is in midstream, so that he cannot help himself. Still worse, if possible, is the refusal then to furnish berths in the order in which they are applied for. A common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application. 6 Cyc. 535. It is liable for an action of damages for a wrongful refusal, and, in addition, for the indignity, vexation and disgrace if there is any evidence of such. *Railroad v. Renard*, 46 Ind. 293; *State v. Railroad*, 48 N. J. L. 55; *Wallen v. McHenry*, 3 Hump. 244.

Nothing is here said that would militate against the *bona fide* engagement of tickets and berths beforehand, nor against the refusal to sell a ticket or berth to any person who, for a good reason, may be objectionable to the other passengers, but the passenger, if not thus objectionable, should be informed that no berths can be had — all being already

sold — when he purchases his ticket, if he then asks for a berth. And if he does not then apply, when applications for berths are made at the purser's window, in regular course after the vessel starts, the berths not already sold or engaged must be disposed of in the order of application. If this were not so, berths could be furnished to the friends of the purser or for a private consideration to him (a tip), as is here testified was the case, to the exclusion of those prior in time, who did not pay the purser, as well as the regular fare. If the supply of berths is exhausted before an applicant is reached, it will be his own fault that he did not apply for his berth and learn whether or not one could be had at the time he bought his ticket.

The plaintiff here testified that he made no objection to the ladies on board being first supplied with berths, but to other men being furnished who applied for berths after he did, one of whom "tipped" the purser.

The answer sets up defences which we cannot consider as no evidence was offered in their support. Upon the evidence offered, the granting
a nonsuit was *Error.*

SECTION II. PERFORMANCE OF UNDERTAKING.

FARNSWORTH v. GROOT.

SUPREME COURT OF NEW YORK, 1827.

[6 Cow. 698.]

ON error from the Schenectady C. P. Groot sued Farnsworth in a justice's court, in trespass, for obstructing the former in passing a lock on the Erie canal, and recovered \$5. On appeal to the Schenectady C. P., Groot recovered \$15.

In the latter court it was proved at the trial that Groot had arrived at the lock before Farnsworth, both passing west. It was regularly Groot's turn to pass the lock, which was not more than a quarter empty when Farnsworth arrived. Groot commanded a freight boat, and Farnsworth a packet boat. Farnsworth, on coming up, asked permission of Groot to pass first, which Groot refused. Farnsworth then demanded it as a right. On being refused, he ordered his hands to push back Groot's boat, which, on seeing the packet boat approaching, the latter had hauled up into the jaws of the lock. The boats were thus both wedged into the lock. Farnsworth's hands attempted to push back Groot's boat, but it was held fast by his hands. This was substantially the case, as made out by Groot, the plaintiff below. According to the defendant's witnesses, he (the defendant below) gave no orders to in-

terfere with Groot's boat; but it was some of the passengers who pushed the boat. After about half an hour's detention, the defendant below ordered his boat back, and the plaintiff below passed first.

The court below denied a motion for a non-suit, at the close of the plaintiff's testimony; and after the defendant had closed his case, decided that his matters of defence were insufficient; and so instructed the jury, who found for the plaintiff below.

The defendant below excepted; and the cause came here on the record and bill of exceptions.

Curia, per SAVAGE, C. J. It is important, first, to ascertain the relative rights of the parties. By the fourth section of the act for the maintenance and protection of the Erie and Champlain canals, and the works connected therewith, passed April 13, 1820 (sess. 43, c. 202), it is, among other things, enacted that, "if there shall be more boats, or other floating things, than one below, and one above any lock, at the same time, within the distance aforesaid (100 yards), such boats and other floating things shall go up and come down through such lock by turns as aforesaid, until they shall have passed the same; in order that one lock full of water may serve two boats or other floating things." By the tenth section (p. 186), it is enacted, "that, in all cases in which a boat, intended and used chiefly for the carriage of persons and their baggage, shall overtake any boat, or other floating thing, not intended or used chiefly for such purpose, it shall be the duty of the boatman, or person having charge of the latter, to give the former every practicable facility for passing; and, whenever it shall become necessary for that purpose, to stop, until such boat for the carriage of passengers shall have fully passed." And a penalty of \$10 is imposed for a violation of this duty.

It was evidently the intention of the legislature, that packet boats should not be detained by freight boats; as it was known that the packets would move faster than the freight boats; and, in the language of the act, every facility was intended to be afforded them. But the right of passing when both are in motion might be of little use if the packets must be detained at every lock until all the freight boats there have passed before it. The fair construction of the act undoubtedly is, that the packets shall have a preference on any part of the canal; and, to be of any use, this right must exist at the locks as well as on any other part of the canal.

In my judgment, therefore, the defendant below had the right of entering the lock first, and the plaintiff below was the aggressor in attempting to obstruct the exercise of that right. Did the defendant, then, do more than he lawfully might in endeavoring to enforce his rights? No breach of the peace pretended. No injury to the boat was done. The plaintiff below was detained, and so was the defendant; but the detention was occasioned by the fault and misconduct of the plaintiff himself. What right, under this view of the subject, has the plaintiff below to complain? The defendant below was the injured

party. The plaintiff below was indeed liable to a penalty, but that could not prevent the defendant below from using proper means to propel his boat, and to remove the obstruction caused by the plaintiff below. Suppose, in any part of the canal, the defendant below had overtaken the plaintiff below, and the latter had refused to permit the former to pass, and had placed his boat across the canal, would not the defendant below have been justified in attempting to remove the obstruction, without injury or breach of the peace? This, I presume, will not be denied. The defendant below has done no more. I think, therefore, the court below erred in refusing to instruct the jury that the plaintiff was not entitled to recover; and the judgment should be reversed.

*Judgment reversed.*¹

TIERNEY v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1879.

[76 N. Y. 305.²]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. Mem. of decision below, 10 Hun, 569.

This action was brought to recover damages to a car load of cabbages, delivered to defendant for transportation, alleged to have been sustained through the negligence of the defendant in not forwarding in due time.

DANFORTH, J. On receiving the cabbages in question and payment of freight, the defendants were bound to forward them immediately to their destination,—such was the duty of a carrier of goods at common law, for if he had not the means of transportation he might refuse to receive the goods, and such is the duty of a railroad corporation. This is so under the statute. By its terms the corporation is required to furnish “accommodations” only for such property as shall be offered a reasonable time before the arrival of the time fixed by public notice for the starting of its trains. Laws of 1850, chap. 140, § 36. And in the absence of a legal excuse the carrier is answerable for any delay beyond the time ordinarily required for transportation by the kind of conveyance which he uses. *Blackstock v. N. Y. & Erie R. R. Co.*, 20 N. Y. 48; *Mann v. Burchard*, 40 Vt. 326; *Illinois C. R. R. Co. v. McClennan*, 54 Ill. 58.

None of the exceptions to the charge were well taken. The learned

¹ Compare; *Bridson v. R. R.*, 28 L. J. (N. S.) Ex. 51; *Heilliwell v. R. R.*, 7 Fed. 68; *Johnson v. R. R.*, 90 Ga. 810; *Galena Co. v. Rae*, 18 Ill. 488; *Silver v. Hall*, 2 Mo. App. 557; *Express Co. v. Smith*, 33 Oh. St. 511; *R. R. v. Nelson*, 1 Cold. 272.—Ed.

² This case is abridged. — Ed.

trial judge instructed the jury "that it was the duty of the defendant to transport the property in question to New York by the first train, unless a reasonable and proper excuse for the delay is shown." To this there was an exception; "and in case there was a pressure of freight cars, the car in question should be forwarded before forwarding ordinary non-perishable property." "They made this contract in regard to perishable property, and it was their duty to forward it by the first train, unless there was such a pressure upon them of property of a similar kind to be transported, and which had arrived before this, to make it impossible," and again he says, "it would be a good excuse if there was a pressure of a similar kind of property to be forwarded, but it would not be an excuse if there was a pressure of other non-perishable property to be forwarded." To this defendant excepted.

The defendant's counsel requested the judge to charge "that defendant is not liable for delay, if such delay was caused by an unusual press of business, and an accumulation of cars beyond the ordinary capacity of the road," and the judge replied, "within the limitations I have now given, I so charge"—to this qualification there was an exception. It will be seen that the attention of the trial court was not called to the question of right of priority to transportation among freights received at different times. The whole charge is applicable to property received at the same time, and does not necessarily, nor by any fair implication, direct a discrimination in favor of perishable property received after non-perishable; no request to charge in regard to it was made; the testimony did not indicate when the property was received which was sent forward on the 8th and on the 9th before 3.20 in the afternoon. The plaintiff's car left Albany at seven, and to make the question available to the defendant the judge should have been asked to direct the jury in regard to it. *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549. I do not think that the question is before us, nor indeed that the evidence was sufficient to raise it in the trial court. The case as presented is that of freight at East Albany; when it, except that of the plaintiff's, reached there does not appear. It was all in the possession and control of the defendant at one and the same time. But if the charge of the trial judge is construed as instructing the jury that the pressure of non-perishable property should not excuse the delay, I am of the opinion that he was right, and the principle of law enunciated by him sound. *Wibert's Case*, *supra*, is not to the contrary. There the question was not presented as to the duty of a carrier to discriminate in favor of perishable freight over non-perishable. That decision, therefore, should not control this case. It is itself placed upon a qualification to the peremptory direction of the statute, and while it should be followed in similar cases, is not to be extended. The distinction suggested by the charge exists. In *Cope v. Cordova*, 1 Rawle, 203, the court, while holding that the liability of the carrier by vessel ceases when he lands the goods at a proper wharf, adds, "it is beside the question to say that perishable articles may be landed at improper

times to the great damage of the consignee, — when such special cases arise they will be decided on their own circumstances." Such a case was presented to this court in *McAndrew v. Whitlock*, 52 N. Y. 40, where a carrier was held liable for the loss of certain perishable property, licorice, under circumstances which would have exonerated him from liability if it had not been perishable. In *Marshall v. N. Y. C. R. R. Co.*, 45 Barb. 502 (affirmed by this court, 48 N. Y. 660), it was held by the Supreme Court that where two kinds of property, one perishable and the other not, are delivered to a carrier at the same time by different owners for transportation and he is unable to carry all the property, he may give preference, and it is his duty to do so, to that which is perishable. In this court the case turned upon other points; but referring to the rule above stated, Hunt, J., says: "The principle laid down is a sound one, and in a proper case would I think be held to be the law. It is not here important."

The rule is a correct one and is equally applicable to the duty of the carrier in whose hands freight has so accumulated that he must give priority to one kind over another.

In requiring the defendant to receive all kinds of property, including perishable, the statute may be construed as imposing upon it such obligations and duties as are required for the proper and safe carriage of that kind of goods. In that respect assimilating a railway corporation to a common carrier, bound by the obligations of the common law to carry safely and immediately the goods intrusted to him, — having in the exercise of care, speed, and priority of transportation, some reference to the natural qualities of the article and the effect upon it of exposure to the elements. *McAndrew v. Whitlock*, 52 N. Y. 40; *Marshall v. N. Y. C. R. R. Co.*, 48 N. Y. 660; *Peet v. Chicago & N. W. R. R. Co.*, 20 Wis. 594. We may also take into consideration the fact that the freight in question was not only perishable but was known to be so by both parties and was shipped as such and with knowledge on the plaintiff's part of the custom of the defendant to give a preference in transportation to such goods, and the parties, though silent, may be regarded as adopting the custom as part of the contract. *Cooper v. Kane*, 19 Wend. 386; *Peet v. Chicago & N. W. R. R. Co.*, 20 Wis. 598.¹

¹ Compare: *R. R. v. Bonand*, 58 Ga. 180; *Van Horn v. Templeton*, 11 La. Ann. 52; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Branch v. R. R.*, 77 N. C. 347; *Weed v. R. R.*, 17 N. Y. 362; *Peet v. R. R.*, 20 Wis. 594. — ED.

COUPLAND *v.* HOUSATONIC RAILROAD CO.

SUPREME COURT OF CONNECTICUT, 1892.

[61 *Conn.* 531.¹]

ACTION to recover the value of a mare and colt injured while being transported by the defendant railroad company; brought to the Superior Court in New Haven County.

The complaint alleged as follows: That on the 25th day of April, 1889, the plaintiff was the owner of a valuable mare and colt, the mare being then worth the sum of \$2,000, and the colt the sum of \$500; that said mare was on that day at Great Barrington in the State of Massachusetts; that the defendant was then and still is a common carrier by railroad, operating a line of railroad from said Great Barrington to the town of Danbury in this State; that on said day the defendant undertook, as a common carrier, for a valuable consideration received of the plaintiff, to transport said mare and colt over the line of its railroad from said Great Barrington to said Danbury; and that the plaintiff by his agent delivered said mare to the defendant at said Great Barrington, and the defendant received the same on board of a box freight car. The complaint then averred the unsuitableness of the car, as being of insufficient height and without partitions, by reason of which the mare hit her head violently against the roof, and became greatly excited, and finally, by a sudden side movement of the car, was thrown down and her leg broken, by reason of all which she soon after died; and the colt, being newly foaled, died also. It also averred that the plaintiff's agent, soon after the train started, finding that the mare was in great danger of injury, requested the conductor to leave the car upon a side track at a station they were about to stop at, but that he refused to do so.

The case was tried to the jury, before F. B. HALL, J., and a verdict rendered for the plaintiff. The defendant appealed on the ground of error in the charge and rulings of the court. The case is fully stated in the opinion.

SEYMOUR, J. . . . The defendant was bound to furnish a suitable car for the transportation of horses. It was still the duty of the jury to inquire whether it did so. If the box car was unsuitable for the transportation of ordinary horses of the value placed by the plaintiff's agent on these, then the defendant might be liable though it informed the plaintiff of its better accommodations for a higher price. But if the jury found that the box car was suitable for the ordinary business of transporting horses, though lower between joints than the special cars furnished at a higher price, that the plaintiff was aware of such defects and was informed about such special cars, and the additional price

¹ This case is abridged. — ED.

charged for them was not unreasonable, and that, thereupon, he attempted to guard against the possible effect of the lower space and acquiesced in the use of the car which was used, then it was competent for them to further find, from such facts alone, that the plaintiff assumed the risks incident to the defect in question. We think the defendant was entitled to a charge to that effect, and that the instructions given were too restrictive in this particular.

The next reason for appeal is that the court charged "that if, in the course of transportation of the animals, the agents of the defendant in charge of the train were apprised or informed by the plaintiff's agent that the transportation was causing fright to the mare, whereby she was acting badly and was in danger of being killed or hurt by further transportation, and if the defendant's agents were requested by the plaintiff's agent to set the car on the side track at Ashley Falls, to prevent further danger to the mare, it was the duty of the defendant's agents so to do if it could reasonably have been done, and the neglect to do so would have been negligence on the part of the defendant." What actually occurred between the agents of the respective parties in this behalf was a matter of dispute which was left to the jury to decide.

The charge was correct. Most of the objections urged against it are answered by the limitation stated by the court, and it was the defendant's duty to have complied with the requests "if it could reasonably have been done." The charge was appropriate to the facts as claimed by the plaintiff.

*New trial ordered.*¹

DAVIS v. GARRETT.

COMMON PLEAS, 1830.

[6 *Bing.* 716.²]

TINDAL, C. J. There are two points for the determination of the court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught

¹ Compare: *Nunn v. R. R.*, 71 Ga. 710; *Raben v. R. R.*, 73 Ia. 579; *Sevier v. R. R.*, 61 Miss. 8; *Hunt v. R. R.*, 94 Mo. 255. — ED.

² Only the opinion is printed. — ED.

fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker v. James*, 4 Campb. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of *Max v. Roberts*. The first ground of objection upon which the judgment for the defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged, that the defendant had and received the

lime in and on board of his barge to be by him carried and conveyed on the voyage in question.

As to the second objection mentioned by the learned lord, in giving the judgment in that case, viz., that there is no allegation in the declaration that there was an undertaking to carry directly to Waterford, it is to be observed, that this is mentioned as an additional ground for the judgment of the court, after one, in which it may fairly be inferred from the language of the chief justice that all the judges had agreed; and which first objection appears to us amply sufficient to support the judgment of the court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of the court. And at all events, we think there is a distinction between the language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to Waterford; but here the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure."

The words "usual and customary" being added to the word direct, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word direct, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that of her voyage.

And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the plaintiff.

*Rule discharged.*¹

EXPRESS COMPANY v. KOUNTZE.

SUPREME COURT OF UNITED STATES, 1869.

[8 Wall, 342.]

DAVIS, J.² . . . To understand what are the rights of the parties to this suit, so far as the court was asked concerning them, it is necessary to see what were the facts proved in the case. It appears that the particular lot of gold dust, which is the subject of this controversy, was

¹ Compare: *Express Co. v. Konnk*, 8 Wall. 342; *Phillips v. Brigham*, 76 Ill. 520; *R. R. v. Kelley*, 125 Pa. St. 620; *Church v. R. R.*, 6 S. D. 235; *R. R. v. Allison*, 59 Tex. 193. — Ed.

See *Thorley v. Orchis S. S. Co.*, 23 T. L. R. 89. — Ed.

² Part of the opinion only is given. — Ed.

confided to the express company for transportation to Philadelphia, on the 29th of September, 1864, and that it was one of a series of shipments of the same kind, running through a period of eighteen months or more. The receipt given for the packages was not different from the ordinary receipts of the company, and was doubtless intended to limit the liability of the company as common carriers. There were two routes employed by the express company to convey their property — one across the State of Iowa, and the other to St. Joseph, Missouri, and thence across that State by the Hannibal Railroad. The latter was the most expeditious route, but the former the safest, as Missouri, although at the time adhering to the Union, was in a disturbed and unsettled condition. The property in dispute was conveyed by the St. Joseph route, and was robbed while in transit across the State by a band of armed men. Under the circumstances in which the country was then placed, no prudent man, in the management of his own affairs, would have sent his property by the Missouri route, if another route were open to him. It seems that the plaintiffs acted on this idea, for one of them testifies that he notified the agent of the company not to send their gold dust by the St. Joseph route. If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes — the one safe and the other hazardous — and yet the express company, in defiance of the wishes of the owner of the property, reject the safe, and adopt the hazardous route. Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation, whenever practicable. *Redfield on Carriers*, § 34. In this case it was practicable to obey the instruction given by the plaintiffs, and the defendant furnishes no excuse for not obeying it.

MERCHANTS' DESPATCH TRANSPORTATION CO. *v.* KAHN.

SUPREME COURT OF ILLINOIS, 1875.

[76 Ill. 520.]

WALKER, C. J. It appears, from the record in this case, that, on October the 2d, 1871, appellants received at Worcester, Massachusetts, two packages of goods to be transported to appellees at Mattoon, in this State. It seems they reached Chicago and were placed in a warehouse, it is contended, and were destroyed by the fire of the 9th of that month. Refusing to pay for the loss, appellees brought suit before a justice of the peace, where they recovered a judgment, but the case was removed to the circuit court by appeal, where a trial was had with like result, and the record is brought to this court on appeal and errors assigned.

It is contended that the goods having been destroyed by fire, the company are excused from their delivery. When they received the

goods for transportation, they assumed all of the duties of common carriers, and their liability must be determined by the obligations which are imposed upon that class of bailees. And the rule is, that such persons are insurers against everything but the acts of God or the enemies of the country.

It is urged, that the fire which destroyed the goods is of the former character of excuses. This, we think, is not correct. There was no compulsion on the company to ship the goods by the way of Chicago. In fact, the evidence shows that a number of previous shipments from the same place or its vicinity had been made by way of Indianapolis, and not coming through Chicago, and that this was the nearer and more expeditious route for their transportation. Had they shipped the goods by the way of Indianapolis, as they had previously shipped other goods to these parties, the loss would not have occurred.

Even if it was proved that the goods had been taken from the cars and placed in a warehouse awaiting reshipment to Mattoon, still they were in transit, and the liability of insurers continued. *Western Transportation Co. v. Newhall*, 24 Ill. 466. The liability of insurers does not terminate until the goods have reached their destination and they have been stored in a safe warehouse. There is no pretense that such was the fact in this case.

It seems that the undertaking of a common carrier, in the absence of any special contract, is to transport the property to the place of destination by the most usual, safe, direct and expeditious route. Failing in any of these, unless prevented by inevitable accident, he must be held liable for loss.

We can see nothing in this case that should relieve appellants from the liability of common carriers.

The evidence sustains the verdict, and the judgment of the court below must be affirmed.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY v. SOLUM.

SUPREME COURT OF THE UNITED STATES, 1918.

[247 U. S. 477.]

BRANDEIS, J. These three cases were heard together. In each of them the plaintiff below sought to recover from the Northern Pacific Railway Company, in a state district court of Minnesota, an amount equal to that by which the freight collected for coal carried on an interstate route from Duluth to some other city in the State, exceeded the rate prescribed by the Minnesota law for carriage between those points on another route, wholly within the State. In each case judgment was entered in the trial court for the plaintiff for such amount; and the judgments were affirmed by the Supreme Court of Minnesota. Each case comes here on writ of error.

Carlton is situated on the Northern Pacific Railway, west of Duluth. Between these Minnesota cities that company operates two lines of railroad, each mainly single track. The northerly line, about 20.9 miles in length, lies wholly within Minnesota; the southerly line, 27.5 miles in length, extends for 11.7 miles through Wisconsin. The southerly is the original Northern Pacific line which was built in 1885. It has relatively light grades. The northerly line was built by the St. Paul and Duluth Railroad Company and came under the management of the Northern Pacific in 1900. It has a heavy upgrade from Duluth to Carlton. Since 1900 both lines have been operated continuously by the Northern Pacific. Because of these grades, the northerly route has been used almost exclusively for such Duluth shipments as are inbound and the southerly route has been used for such as are outbound. Until June, 1907, the rates were the same over the two routes. They were duly filed with the Minnesota Railroad and Warehouse Commission and with the Interstate Commerce Commission.

In 1907 the legislature of Minnesota fixed for intrastate carriage of coal, maximum rates which were lower than the published rates theretofore charged. The rates so fixed were to take effect June 1, 1907; but before that date their enforcement was enjoined by the proceedings which were reviewed in *The Minnesota Rate Cases*, 230 U. S. 352. This injunction remained in effect until July, 1913, when it was dissolved pursuant to that decision. Until then the Northern Pacific continued to charge the published rates (and therefore the same rates) on all shipments of coal from Duluth to Minnesota points, whether moving via the interstate route or the intrastate route. After dissolution of the injunction, the company refunded on the few shipments which had moved over the intrastate route, the amount by which the charges actually collected exceeded the charges which would have been collected had the rates fixed by the legislature been observed. It refused, however, to make refunds on shipments made over the interstate route, on the ground that the state statute did not affect them.

Among such shipments were those involved in these cases, from Duluth by the interstate route to three Minnesota points, Hitterdal, Battle Lake, and Hawley, cities on the Northern Pacific lying west of Carlton. The shipment in each case was delivered to the Railway without any instruction as to how it should be routed; but the plaintiffs contended that, in the absence of instructions, it was the duty of the carrier to select that route which was for the interest of the shipper, namely the intrastate route; because it would prove to be the cheaper, if the rates prescribed by the State were upheld. The several shippers claimed that they were entitled to the same refunds which would have been made if the coal had been carried on the intrastate route; and the suits were brought to recover these amounts.

The Railway answered in the first two cases, that, at the time of the shipments, the rates published were (because of the injunction in

effect) identical on the two routes; that "in the ordinary and proper and economical operation of its property, it was necessary to move, and this defendant in general did and does now, move all out-bound shipments from Duluth via the interstate line and all in-bound shipments into Duluth via the intrastate line, and that to have carried the shipments referred to in the complaint to their destination . . . via said intrastate line instead of via the interstate line, over which they were actually carried, would have entailed great additional expense upon this defendant"; and that these rates were just and reasonable for the service performed and were collected pursuant to the tariffs published and filed with the Interstate Commerce Commission. In the third case the answer alleged in addition, that, on December 24, 1915, and prior to the commencement of that action, the Interstate Commerce Commission had, in *Holmes & Hallowell Co. v. Great Northern Ry. Co.*, 37 I. C. C. 627, decided that the practice of defendant in routing its westbound shipments from Duluth over its interstate line was a proper and reasonable practice and had denied the application for reparation on shipments of coal made over that route.

The judgments entered were upon demurrers to the answers. That in number 205 was entered May 28, 1916; that in number 206 on May 23, 1916; that in number 526 on May 2, 1917. (133 Minnesota, 93; *Id.* 461; 136 *Id.* 468.) In each case it is assigned as error that the state court held that the cause of action therein is not affected by the federal statute regulating interstate commerce; and also that the state court assumed jurisdiction in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway, in sending via its interstate route all shipments of the character involved in these cases, was reasonable. In the third case the additional error is assigned that the court held that the intrastate rate should be applied, although the Interstate Commerce Commission had found that the practice of routing outbound shipments from Duluth via the interstate route was proper and reasonable. The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the Supreme Court of Minnesota; was considered and overruled by that court (133 Minnesota, 93, 97); and is available here. In numbers 205 and 206 judgment was entered before the Act of September 6, 1916. A federal question is involved; and the cases are properly here under section 237 of the Judicial Code. In number 526 the judgment was entered after the Act of September 6, 1916, c. 448, 39 Stat. 726, took effect. In that case there was not drawn in question the validity of a statute or treaty nor the validity of any authority exercised under the State. *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U. S. 162; *Ireland v. Woods*, 246 U. S. 323; *Stadelman v. Miner*, 246 U. S. 544. The writ of error in number 526 must therefore be dismissed; although the defendant in error has not objected to the jurisdiction of this court.

We proceed to consider numbers 205 and 206. In those cases the Supreme Court of Minnesota declared that the carrier's duty was governed by the common law and it stated the applicable principle as follows (p. 96):

"Where a railroad company operates two lines of railroad between the same points, and the freight rate over one line is less than such rate over the other line, if other conditions are reasonably equal, it is the duty of the company to transport shipments between those points over the line which will give the shipper the benefit of the cheaper rate. To justify transporting such shipments over the other line and thereby compel the shipper to pay the higher rate, the company must show that such line was chosen by the shipper or that the circumstances or exigencies were such that a proper regard for the interests of the shipper precluded the use of the cheaper line."

In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only "if other conditions are reasonably equal." Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice. In the cases before us the justification is rested upon a general practice. The answers allege that, because of the grades of the two lines, all outbound shipments were and are in general moved over the southerly route on account of the very great expense which another arrangement would entail. It may well be, under such circumstances, that carriage over the interstate route would be justified, even if it appeared that it was feasible to haul freight out of Duluth over the intrastate line. Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question, one of perhaps considerable complexity.

The Railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. *Texas & Pacific Ry. Co.*

v. American Tie & Timber Co., 234 U. S. 138, 147; *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 131; *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 469. The Interstate Commerce Commission has frequently entertained proceedings for refunds for misrouting under such circumstances.¹ Indeed, long before these suits were filed, proceedings had been begun before the Interstate Commerce Commission against this and other railroad companies to secure the refunds of amounts paid for shipment over the interstate routes between Minnesota points in excess of that which would have been payable, if shipment had been made over the intrastate routes. *Holmes & Hallowell Co. v. Great Northern Ry. Co.*, 37 I. C. C. 627, 630, 645, 649. And before the judgments were entered by the Supreme Court of Minnesota in these cases, the Interstate Commerce Commission had determined that, under the circumstances, "the carrier was not required by law to change its methods of operation and abandon the use of its more favorable interstate line"; and had refused to grant refunds in respect to the shipment of other commodities, under circumstances precisely like those presented here.

The fact that the administrative question presented involves an intrastate as well as interstate route does not prevent the application of the rule, that the courts may not be resorted to until the administrative question has been determined by the Commission. It is sufficient that one of the routes is interstate. *Compare Minnesota Rate Cases*, 230 U. S. 352, 419-420; *Houston, East & West Texas Ry. Co. v. United States*, 234 U. S. 342.

In numbers 205 and 206 judgments reversed.

In number 526 writ of error dismissed.

THE KRONPRINZESSIN CECILIE.

SUPREME COURT OF THE UNITED STATES, 1917.

[244 U. S. 12.]

MR. JUSTICE HOLMES delivered the opinion of the court.

This writ was granted to review two decrees that reversed decrees of the District Court dismissing libels against the steamship *Kronprinzessin Cecilie*. 238 Fed. Rep. 668. 228 Fed. Rep. 946, 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the out-

¹ *Willman & Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 22 I. C. C. 405; *Lathrop Lumber Co. v. Alabama Great Southern R. R. Co.*, 27 I. C. C. 250; *Texarkana Pipe Works v. Beaumont, Sour Lake & Western Ry. Co.*, 38 I. C. C. 341; *McCaulld-Dinsmore Co. v. Great Northern Ry. Co.*, 41 I. C. C. 178; *Cardwell v. Chicago, Rock Island & Pacific Ry. Co.*, 42 I. C. C. 730.

break of the present war. The question is whether the turning back was justified by the facts that we shall state.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and, we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 354, Americans; and two or three from Italy, Belgium, Holland, &c. She continued on her voyage until about 11.05 p. m., Greenwich time, July 31, when she turned back; being then in 46° 46' N. latitude and 30° 21' W. longitude from Greenwich and distant from Plymouth about 1070 nautical miles. At that moment the master knew that war had been declared by Austria against Serbia, (July 28,) that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless message to the master: "War has broken out with England, France and Russia. Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 p. m., August 2, and 1 a. m., August 3, and would have delivered the gold destined for England to be forwarded to London by 6 a. m., August 3. On August 1 at 9.40 p. m., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered of the seizures, but the vessels were detained. The German army entered Luxembourg, and there were skirmishes with French troops. On August 3 Germany was at war with France, and at 11 p. m., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, *e. g.*,

Prinz Adalbert [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers or people," other exceptions necessarily are to be implied, at least unless the phrase restraint of princes be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine v. Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor v. Caldwell*, 3 Best & Smith, 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman v. Pollard*, 43 Maine, 463. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co., Limited, v. Watts, Watts & Co., Limited*, [1916] 2 K. B. 826, 845. The *Styria*, 186 U. S. 1. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. The *Teutonia*, L. R. 4 P. C. 171. The *San Roman*, L. R. 5 P. C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. *Oliver v. Maryland Insurance Co.*, 7 Cranch, 487, 493. *Craig v. United Insurance Co.*, 6 Johns. 226, 250, 253. See also *British & Foreign Marine Ins. Co., Limited v. Samuel Sanday & Co.*, [1916] A. C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the master had

remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of the *Styria*, 186 U. S. 1, although not strictly in point tends in the direction of the principles that we adopt.

Decree reversed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent, upon grounds expressed in the opinions delivered by Circuit Judges DODGE and BINGHAM in the Circuit Court of Appeals — 238 Fed. Rep. 668.

CAMPION v. CANADIAN PACIFIC RAILWAY.

CIRCUIT COURT OF UNITED STATES, 1890.

[43 Fed. 775.]

GRESHAM, J. Having determined to remove from Chicago to Seattle with her family, (two daughters), the plaintiff, on May 14, 1888, visited the office of the defendant to arrange for the shipment of her furniture, books, pictures, clothing, and other household goods. The defendant's agent agreed to receive and forward the goods, and informed the plaintiff that from Chicago to St. Paul they would be carried over the Chicago, St. Paul & Kansas City Road, thence to Vancouver over the defendant's road, and thence to their destination by the Northern Pacific Navigation Company. The defendant knew that the plaintiff desired to receive and care for her goods when they reached their destination,

and that she expected to start on her journey that day. After delivering her property at the freight depot of the Kansas City Company at Chicago, and receiving a memorandum receipt for it, the plaintiff went to the defendant's office, showed her receipt, and was informed that an agent of the defendant was at the freight office of the other company, expecting to meet her there. The plaintiff went to the latter office, and met an agent of the defendant in company with an agent of the other company, and was informed by them that her goods would not be forwarded until the freight charges, \$105, were paid, the regulations of the defendant requiring payment in advance for carrying such property. Having but \$75 with her, the plaintiff left, saying she would return in a day or two with money enough to pay the freight bill; but before leaving she handed the receipt to the defendant's agent, who promised to have a bill of lading ready for her. Two days later the plaintiff again called at the defendant's office, and informed a clerk or employee, he being the only person present, that she was detained by the illness of one of her daughters, and some business matter, and that her goods would have to remain in the freight house for the present. The employee said he supposed that would be satisfactory, and that he would inform the defendant's freight agent of her situation, which he did. The plaintiff then went to the freight office of the Kansas City Company, and informed its agent of the cause of her detention, who told her that, under the circumstances, her goods could remain where they were without storage charges. The following week the plaintiff again visited the defendant's office, and informed its agent that she was still detained at Chicago by the illness of her daughter; and some days later the plaintiff had an opportunity to ship her goods to Seattle over another line, at a lower rate, in a car which had been obtained by a friend, his goods not filling the car. The plaintiff accordingly went to the Kansas City Company's freight depot for her goods, and was for the first time informed by an agent that they had been forwarded the evening of the day she delivered them, and that he had not notified her of the fact when she called before, because he did not then know of the shipment. The plaintiff immediately went to the defendants' office and asked its agent if her goods had been forwarded, and, if so, why she had not been notified of the fact. The agent replied that it was true her goods had been shipped the day she delivered them at the other company's freight warehouse; that one of the defendant's agents in charge of such matters, on his own responsibility, had ordered the shipment; and that the defendant had not notified her of the fact because her address could not be found. The plaintiff then saw the latter agent, and told him she had given him her address, and had seen him put it on his file, and he replied that her address had been lost, and for that reason she could not be notified. The goods arrived at Seattle on May 30, and, no one appearing to receive them, they were stored in a warehouse, and six days later were destroyed by fire. The plaintiff testified that if she had known her goods had been forwarded she

would have reached Seattle in time to receive them, and that when they were destroyed she believed they were still in Chicago.

If there had been no agreement or understanding that the goods should be held until the defendant's demand was complied with, the defendant would have been bound to forward them at once, or without unreasonable delay; but, having agreed to hold the goods until the charges were paid, it was a breach of the contract to forward them without notice to the plaintiff. She believed, as she well might, that her goods would not be forwarded until she complied with the defendant's demand, and that she could and would reach Seattle in time to care for them on their arrival. She was prevented from doing this by the neglect of the defendant to discharge a plain duty that it owed her. Her goods were destroyed 2,000 miles away, when, owing to the misleading conduct of the defendant, she supposed they were still in Chicago. If a carrier receives goods for transportation, agreeing to hold them until a future date, or until the happening of an event, and forwards them at once, damages resulting from a breach of the agreement may be recovered.

It was clearly the defendant's duty to hold the goods, or notify the plaintiff that it was willing to forward them, waiving prepayment of the carrying charges.

Finding and judgment for the plaintiff for \$1,650.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD
v. BULLOCK.

SUPREME COURT OF NEW JERSEY, 1897.

[60 *N. J. Law*, 24.]

VAN SYCKEL, J. On the 28th of January, 1896, Bullock, the plaintiff, went to the Hoboken station of the defendant railroad company, intending to take passage in its cars to Dover. He had with him two tickets, entitling him to a passage, one a family ticket and the other a commutation ticket. On the family ticket there was a contract endorsed "that in consideration of the reduced rate at which the ticket was issued, wearing apparel only should be taken as baggage." On the commutation ticket the contract was "that it entitled the holder to personal passage only."

On the day named the plaintiff entered the car, carrying with him two packages containing an assortment of groceries, purchased for the use of his family. He was informed by employees of the company that he had no right to take the packages with him, and that he must remove them or get off the car himself. He declined to do either and thereupon the packages were taken from him and put in the express car and he was allowed to proceed on his journey.

This suit was brought to recover damages for this alleged injury, and the trial resulted in a verdict for the plaintiff for \$1,006.

The rights of the passenger must be measured by the contract he made with the company. Whether the conditions annexed to it are reasonable is a matter of no legal importance whatever. The parties were competent to contract and made the contract for themselves, and it could not be altered or abrogated by one of the parties to it without the consent of the other. The right to personal passage clearly does not include the right to transportation of packages of groceries, and such packages are not a part of the wearing apparel. The rights of the respective parties must be adjudged upon the assumption that the railroad company was under no legal obligation to carry the passenger and the packages. The plaintiff had a qualified right — that is, a right to personal passage — and when he presented himself at the door of the car with the forbidden packages he was disqualified to demand a passage under the terms of his contract. The agreement of the company was to transport him and not to carry him and a lot of groceries. When he presented himself at the door of the car he was not within the description of the contract for transportation, and the company had a right to refuse him admittance until he removed the disqualification and applied in conformity to the terms of their undertaking. At that juncture it seems to be very clear that the company could do no more than deny admission to the plaintiff and resist his entrance into the car by such reasonable force as was necessary to prevent it.

The plaintiff had voluntarily rendered himself disqualified to exact performance of the agreement on the part of the company, but that would not have justified the company in resorting to force to separate the packages from his person and thereby remove the voluntary disqualification.

The packages were the property of the plaintiff. He had a right to the possession of them and no one could lawfully wrest them from him against his will. But he succeeded in entering the car with his packages, although he was warned that he had no right to do so. What could the company lawfully do under these circumstances?

Anything which the company might do, to be lawful, must be an act which would cast no after duty on it to the passenger in respect to such act, nor subject the company to any after liability for damages by reason of having done it.

Such after responsibility would incontestably prove that the company had overstepped the line which circumscribed its right to redress itself.

Applying this test, can the act of the company, which constitutes the alleged wrong in this case, be justified? If the company took the plaintiff's property from him against his will and removed it from the car, it became the voluntary custodian of such property, and it is not perceived how the company could escape legal liability to restore it to the plaintiff or answer for its value in damages.

The officer of the company not only took the packages without the

consent of the plaintiff, but he took them by force, while the plaintiff resisted and tried to prevent it. He had no more right to resort to force to remove such property than the manager of a theatre would have forcibly to take the hat from the head of a lady who had a seat there under a contract that she would not wear a hat during the play. The remedy would be to remove the person who refuses to conform to the conditions under which the benefit of the contract can be claimed.

The presence of the plaintiff in the car did not deprive him of the right to the possession of his property. His presence there with such property was offensive to the contract; it put him in the position of any other person who had no right to remain upon the train, and subjected him to be ejected with his packages, no unnecessary force being used.

It was for the plaintiff to elect, upon being notified that he must remove his goods or leave the train, whether he would accept transportation upon the terms agreed upon.

The right of the company was to refuse to carry him under existing conditions, and it was without legal authority to resort to force to put him, against his will, in such condition that he would be entitled to his seat in the car.

Force could be legally exerted only upon the disqualified man. The forcible removal of his parcels, and the transfer of them to the express car with orders to carry them onward, was unlawful and constituted a conversion.

The trial court submitted the case to the jury with proper instructions upon this question, but, in my judgment, the damages given by the jury are excessive and unwarranted under the circumstances disclosed by the evidence.

The plaintiff himself provoked the difficulty by attempting to assert a right which he did not possess. The contract was plain and unambiguous, and he chose to resort to the forcible method of asserting an unfounded claim, and deliberately invited a conflict with the servants of the company at a time when they were compelled to act quickly. In an action for damages resulting from a mistake committed under such circumstances, the plaintiff should be strictly limited to compensation for his loss. There was manifestly no malice on the part of the company and no ground for punitive damages. The plaintiff's loss will be satisfied by paying him the value of his parcels and for the injury done to his clothing, which was slight.

The rule to show cause should be made absolute.¹

¹ *Acc. Gregory v. C. & N. W. Ry.*, 100 Ia. 345, 69 N. W. 532. See *Runyan v. Central R. R.*, 61 N. J. Law, 537, 41 Atl. 367. — Ed.

WILSON v. GRAND TRUNK RAILWAY.

SUPREME COURT OF MAINE, 1868.

[56 Me. 60.]

APPLETON, C. J. The plaintiff was a passenger on board the defendants' cars, having seasonably paid her fare. Her baggage was not with her, it having been left behind, without fault of the defendants. Some two or three days afterwards it was left in charge of their servants, to be transported to the Empire station on their line, but it never reached its place of destination. This suit is brought to recover the value of the baggage lost.

The presiding justice instructed the jury, "That, if they should find that the plaintiff went on board the defendants' road as a passenger, on Tuesday preceding, without baggage, and that the trunk and its contents were ordinary personal baggage, such as a passenger would be entitled to take with himself without extra charge, it was not necessary that there should be proof that anything was paid for carrying the trunk between the same points; that the price paid by the plaintiff, for her own passage, and the evidence in the case, if found to be true, were sufficient consideration for the promise alleged in the writ."

As the plaintiff's trunk was taken for transportation some days after she had passed over the defendants' road, the substance of the charge of the presiding judge was, that the price paid for the plaintiff's ticket included the compensation due to the defendants for their subsequent transportation of her trunk, the trunk being personal baggage. In other words, it was not necessary that the baggage of the passenger should go with the passenger, but, it might be afterwards subsequently and without any additional charge for its freight.

The fare for the passenger includes compensation for the carriage of his baggage, as to which the carriers of passengers are to be regarded as common carriers. There need be no distinct contract for the carriage of the baggage. The fare covers the compensation for the freight of the baggage. The baggage must be ordinary baggage, such as a traveller takes with him for his personal comfort, convenience, or pleasure for the journey. It must be the "ordinary luggage" of a traveller, regard being had to the journey proposed.

It is implied in the contract that the baggage and the passenger go together. "The general habits and wants of mankind," observes Erle, C. J., in *Phelps v. L. & N. W. Railway Co.*, 115 E. C. L. 327, "must be taken to be in the mind of a carrier when he receives a passenger for conveyance; and the law makes him responsible for all such

¹ Opinion only is printed. — ED.

things as may be fairly carried by the passenger for his personal use." In *Cahill v. L. & N. W. Railway Co.*, 100 E. C. L. 172, Willes, J., says, "When a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only; and that he can no more extend the contract to the conveyance of a single package of merchandise than of his entire worldly possessions." In *Smith v. Railroad*, 44 N. H. 330, Bel- lows, J., uses the following language:—"Until a comparatively recent period the English courts were inclined to hold that carriers of passengers by stage-coaches, and otherwise, were not liable for injuries to their baggage, unless a distinct price was paid for its transportation. But it is now well settled that the price paid for the passenger includes also the personal baggage required for his personal accommodation; the custody of the baggage being regarded as accessory to the principal contract. . . . In general terms it may include, not only his personal apparel, but other conveniences for the journey, such as a passenger usually has with him for his personal accommodation." "The baggage," observes Mullin, J., in *Merrill v. Grinnell*, 30 N. Y. 619, "must be such as is necessary for the particular journey that the passenger is, at the time of the employment of the carrier, actually making."

It follows from the nature and object of the contract, that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey. As it is for his use and convenience, it must necessarily be with him, as it is for him. He may reasonably be expected to exercise some supervision over it during, and be ready to receive it, at the termination of his journey. In the present case the baggage was forwarded two days after the plaintiff had passed over the road. If its transmission may be delayed two days and the carrier is required to take it without any compensation save the fare paid by the passenger, who had preceded it, it may equally be delayed weeks or months and the carrier be required to forward it without any additional pay. It presents a different question if the delay is caused by the fault of the carrier, or there is a special agreement with him or his authorized agent for the subsequent transportation of the passenger's baggage.

The fare paid by a passenger over a railroad, is the compensation for his carriage, for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier, or of negligence on his part, is liable, like any other article of merchandise, to the payment of the usual freight.

The declaration is in the usual form against carriers. It is well settled that the carrier need not be paid in advance, unless he specially demand it, and that he has a lien on the goods carried for his freight.

It is not necessary to determine whether or not the defendants would be liable for the trunk as common carriers of merchandise for compensation. The case, as presented to the jury and as argued before us, raises the single question of the obligation of the carrier of passengers to take their baggage at a time subsequent to that of the carriage of the passenger, without additional compensation.

Exceptions sustained.

KENT, DICKERSON, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.¹

WOODS v. DEVIN.

SUPREME COURT OF ILLINOIS, 1852.

[13 Ill. 746.²]

TREAT, C. J. This was an action on the case brought by Devin against Woods. The declaration alleged, in substance, that the plaintiff, on the 7th of August, 1851, delivered on board the steamboat "Governor Briggs," then lying at Peoria, and owned by the defendant and used by him in the transportation of passengers and freight on the Illinois River between Peoria and La Salle, a carpet-bag containing one case of duelling-pistols, one pocket-pistol, and various articles of wearing apparel, of the value of \$200, to be carried on said boat from Peoria to La Salle for a certain reward, and that the defendant received the same for the purpose aforesaid; yet the defendant, not regarding his duty in the premises, did not deliver the carpet-bag and contents at La Salle, but, on the contrary, lost the same. The plea was, not guilty.

It appeared, in evidence, that on the 7th of August, 1851, the plaintiff was about to take a journey from Peoria to the city of New York, and engaged his passage for La Salle in the steamboat "Governor Briggs," then owned by the defendant, and run by him on the Illinois River between Peoria and La Salle for the conveyance of passengers and freight; that the plaintiff sent his trunk and carpet-bag to the boat as she was about to leave Peoria for La Salle, and the same were received on board by the direction of the defendant; that the plaintiff left the boat temporarily, and while absent on shore the carpet-bag was stolen and rifled of its contents, and the same were never recovered by him; that he did not proceed on his journey in consequence of the loss of the carpet-bag; that the plaintiff did not pay his fare for the passage, nor was there any express contract for the carriage of the trunk and carpet-bag; that the carpet-bag contained articles of wearing ap-

¹ Compare: *Beers v. Boston R. R.*, 67 Conn. 417; *Perkins v. Wright*, 37 Ind. 27; *Warner v. Burlington, &c. R. R.*, 22 Ia. 166; *Flint R. R. v. Weir*, 37 Mich. 111; *Chesapeake, &c. R. R., v. Wilson*, 21 Grat. 654. — ED.

² Opinion only is printed. — ED.

parel of the value of \$36, a pair of duelling-pistols of the value of \$25, and a pocket-pistol of the value of \$15.

The court refused to give the following instructions asked by the defendant: "That if the carpet-bag was merely baggage as is usual for passengers to carry, and was designed as such by the plaintiff, the plaintiff cannot recover under this declaration, and the jury will find for the defendant. If the carpet-bag was for the purpose and use of carrying clothing, &c., the plaintiff cannot recover for the contents of the bag, except for such articles as are usually carried by travellers; and the jury are the judges whether or not the pistols mentioned are usually a portion of the baggage of a travelling gentleman, and if not, the jury will not allow any amount for the pistols."

The jury found the issue in favor of the plaintiff, and assessed his damages at \$73.75. The court overruled a motion for a new trial, and gave judgment on the verdict.

A common carrier of passengers is responsible for the baggage of a passenger. His duty in this respect is the same as that of a common carrier of goods; and he can only excuse himself for the non-delivery of the baggage of a passenger by showing that it was lost by the act of God or of the public enemy. His responsibility commences when the baggage is delivered to him or his authorized agent. *The Camden and Amboy Railroad v. Belknap*, 21 Wend. 354. His compensation for carrying the baggage is included in the fare of the passenger. *The Orange County Bank v. Brown*, 9 Wend. 85; *Hawkins v. Hoffman*, 6 Hill, 586. Prepayment of the fare is not necessary in order to charge the carrier for the loss of the baggage. *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R. 16. He has a remedy by action on the implied contract of the passenger to pay the customary fare; and he has also a lien on the baggage, which he is not compelled to deliver until the fare is paid. Angell on Carriers, § 375; Story on Bailments, § 604. By not requiring the fare to be paid in advance, he relies for remuneration on the remedies indicated.

In the present case, the defendant was a common carrier of passengers. The plaintiff engaged a passage to La Salle, and sent his baggage to the boat. The moment it was received on board the defendant became responsible for its safe delivery at the port of destination, loss occasioned by inevitable accident or the public enemies only excepted. The carpet-bag was stolen from the boat and never recovered by the plaintiff. Loss by theft is not within either of the exceptions to the risk of a common-carrier. The defendant is therefore chargeable with the value of the articles in the carpet-bag, unless they are not to be regarded as forming a part of the baggage of a traveller. It is conceded that the articles of wearing apparel were properly baggage; and the only question is in respect to the pistols. What constitutes the baggage of a traveller, for the loss of which a common carrier is liable, is a question of some practical importance, and one that has been much considered in reported cases. It is argued in all the cases that the

term "baggage" includes the wearing apparel of the traveller. In the Orange County Bank *v.* Brown, *supra*, the trunk of a passenger containing \$11,250 in money belonging to the bank was lost; and the bank sought to recover the amount of the carrier, on the ground that it was part of the baggage of the passenger. But the court decided that the money did not fall within the term baggage; and that the attempt to carry it free of reward under cover of baggage was an imposition on the carrier. In *Pardu v. Drew*, 25 Wend. 457, where a trunk containing valuable merchandise, and nothing else, was taken on board of a boat by a passenger, and deposited with the ordinary baggage, it was held that the carrier was not chargeable for its loss. In *Hawkins v. Hoffman*, *supra*, it was decided that the term "baggage" did not embrace samples of merchandise carried by a passenger in his trunk for the purpose of enabling him to make bargains for the sale of goods. In *Cole v. Goodwin*, 19 Wend. 251, and *Weed v. The Saratoga and Schenectady Railroad Company*, 19 Wend. 534, the court held that a carrier was liable for money in the trunk of a passenger not exceeding a reasonable amount for travelling expenses. In *Jones v. Voorhees*, 10 Ohio, 145, a carrier was made liable for the value of a gold watch lost from the trunk of a passenger. In *McGill v. Rowand*, 3 Barr, 451, the husband was permitted to recover of the carrier the value of his wife's jewelry which had been taken from her trunk on the coach in which she was a passenger. In *Porter v. Hildebrand*, 2 Har. 129, the court held that a carpenter might recover from a carrier the value of tools contained with clothing in his trunk, which the carrier had lost, the jury having found that they were the reasonable tools of a carpenter.

The principle of the authorities is, that the term "baggage" includes a reasonable amount of money in the trunk of a passenger intended for travelling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and that it does not extend to money, merchandise, or other valuables, although carried in the trunks of passengers, which are designed for different purposes. And regard may with propriety be had to the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger. A more definite rule cannot well be laid down. The remarks of Bunson, J., in *Hawkins v. Hoffman*, *supra*, are pertinent. He says, "It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for instruction or his amusement by the way, or carries his gun or fish-

ing-tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such."

We think the articles in question formed a part of the baggage of the plaintiff, and as such come within the risk of the carrier. They were not carried for purposes of sale or traffic, but for the personal use and protection of the passenger; and it is not unusual for such articles to be carried in the trunks of travellers.

There was no substantial variance between the declaration and the evidence. The declaration alleged that the defendant received the carpet-bag, to be carried from Peoria to La Salle for a reward. The proof clearly sustained the averment. It indeed showed in addition, that the plaintiff engaged a passage for the same destination, and that he had other baggage. But as the only cause of complaint against the defendant was the loss of the carpet-bag, it was not necessary to state the additional matter in the declaration, especially in an action on the case for the breach of the common-law duty of the carrier. It might perhaps be otherwise in an action of assumpsit on the contract of the carrier. See *Weed v. The Saratoga and Schenectady Railroad Company*, *supra*.

The judgment is affirmed.

*Judgment affirmed.*¹

WEISENGER v. TAYLOR.

COURT OF APPEALS, KENTUCKY, 1866.

[1 *Bush*, 275.²]

ROBERTSON, J. The appellant, Henry Weisenger, sued the appellees, J. M. and G. H. Taylor, for \$90, stolen from a room occupied by him while a guest in their public inn; charging that the loss resulted from their culpable negligence.

The Circuit Court sustained a demurrer to the petition, and, on failure to amend, dismissed it.

The common, like the civil law, but even more stringent, exacts of inn-keepers, as bailees of the baggage and goods of their guests, extraordinary care, and imposes on them a responsibility nearly commensurable with that of common carriers, approximating insurance of such articles when confided expressly or impliedly to their custody and care. But whenever the guest assumes the custody and control of his goods in such a way as to indicate that he does not trust the inn-keeper, and concedes to him no control, they are not in the implied custody of the inn-keeper, and he is therefore not responsible, unless they shall be

¹ Compare: *Hudston v. Midland R. R.*, L. R. 4 Q. B. 366; *Fraloff v. New York R. R.*, 100 U. S. 24; *Hickox v. Naugatuck R. R.*, 31 Conn. 281; *Staub v. Kendrick*, 121 Ind. 226; *Connolly v. Warren*, 106 Mass. 146; *Porter v. Hildebrand*, 14 Pa. St. 149; *Oakes v. No. Pacific R. R.*, 20 Ore. 392. — ED.

² Opinion only is printed. — ED.

stolen by some of his own household, whose honesty and fidelity he is presumed to guarantee.

The inn-keeper's responsibility is only co-extensive with his custody and control, and his pledge of the integrity of his servants. And the question of custody and control depends on facts indicative of intention. If the guest, having an article not attached to his person, nor carried about with him for his personal convenience—such, for example, as a bag of gold, a case of jewelry, or a package of paper currency—the fact that he does not either notify the host of it, or offer to place it in his actual custody, would imply that he trusted to his own care, and intended to risk all consequences. And, if the article thus held by himself alone should be stolen from him while abiding in the inn, the loss, like the preferred custody, might be his own alone, unless it resulted from the dishonesty of some of the household. The inn-keeper, deprived of both custody and control, could not be held responsible on any just or consistent principle.

But such articles as apparel worn at the time, and watch and pocket money, are not expected to be delivered to the inn-keeper for safe-keeping, and the retention of them in the guest's room neither keeps them from the implied custody of the inn-keeper, nor implies a waiver of his responsibility. In respect to such articles, therefore, thus kept, the inn-keeper is *prima facie* the responsible curator. And it seems to us that the \$90 kept in the appellant's pocket for daily use for incidental expenses, should be considered as embraced in this last category. This being so adjudged, the petition contains every allegation necessary to show a cause of action to be tried on a proper issue of fact.

Wherefore, the judgment is reversed, and cause remanded for further pleadings and proceedings.¹

MCKIBBIN v. WISCONSIN CENTRAL RAILWAY CO.

SUPREME COURT OF MINNESOTA, 1907.

[100 Minn. 270.]

START, C. J. On the afternoon of December 30, 1905, a travelling salesman of the plaintiff's checked four trunks containing samples of merchandise belonging to them over the defendant's railroad from St. Paul to Glenwood, Wisconsin. The trunks got to Glenwood late in the evening of the same day and were placed in the baggage room of the station house, which with the trunks and their contents was completely destroyed by fire, some twenty hours afterwards. This action was brought to recover the value of the trunks and their contents on the ground that they were destroyed by reason of the defendant's alleged negligence. It was admitted on the trial that the defendant's liability as a common carrier had terminated before the fire. At the close of

¹ Compare: *Lanier v. Youngblood*, 73 Ala. 587; *Matter v. Brown*, 1 Cal. 221; *Sassen v. Clark*, 37 Ga. 242; *Giles v. Fantelroy*, 13 Md. 434; *Smith v. Wilson*, 36 Minn. 334; *Scheffer v. Wilson*, 5 S. Dak. 233.—ED.

the evidence the defendant moved the court to direct a verdict in its favor, for the reason that upon all the evidence the plaintiffs were not entitled to recover. Motion denied, exception by the defendant, cause submitted to the jury, and a verdict returned for the plaintiffs for the admitted value of their property. The defendant made a motion for judgment in its favor notwithstanding the verdict, or for a new trial, and appealed from an order denying its motion.

The important question raised by the assignments of error is whether upon any reasonable view of the evidence the plaintiffs are legally entitled to recover from the defendant for the loss of their property.

1. The first contention of the defendant to be considered is to the effect that there was no evidence sufficient to sustain a finding by the jury that the defendant had notice or knowledge that the trunks contained merchandise when it checked them as baggage; hence the trial court erred in submitting that question to the jury. We held in *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052, that courts will take judicial notice of the fact that it is the general custom of common carriers by railroads to carry sample trunks with their contents of merchandise as the baggage of travelling salesmen, but not of the conditions or limitations, if any there be, under which this is done. Conceding that it was necessary for the plaintiffs to show in this case that the defendant's baggage agent knew that the trunks contained merchandise when he checked them, we are of the opinion that the evidence was ample to sustain a finding that he did so know, and that it was not error to submit the question to the jury. It was not necessary to prove such knowledge on the part of the baggage agent by evidence of a direct statement to that effect made to him by the commercial traveller, or by other direct evidence; for such fact may be inferred from the circumstances of the transaction. *Trimble v. New York*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

In the case at bar the evidence tends to show that there were four sample trunks, three of which were each approximately forty-six and a half inches in length, twenty-eight and a half inches in width, and seven inches in height, while the fourth one was somewhat smaller; that their aggregate weight was some eight hundred pounds, and that they were of the form and pattern of trunks used for the transportation of merchandise samples; and that it was the custom of the defendant to check such trunks as baggage, without limitation or condition, even where it had knowledge of their contents. In view of this evidence and the general custom to check sample trunks with their contents of merchandise, it would be an imputation upon the intelligence of the baggage agent to suggest that he did not understand that the four large sample trunks contained merchandise, or to suggest that he was so silly as to believe that the four trunks contained only the personal wearing apparel of a merry knight of commerce. In the case of *Trimble v. New York*, *supra*, the evidence which was held sufficient to show knowledge of the contents of the sample trunk

by the agent checking it was of the same general character as in this case, but not so conclusive; for there was only one trunk in that case, while here there were four, all checked at the same time and by the same travelling salesman.

2. The defendant further claims that the plaintiffs' salesman checked the trunks without any intention of going with them over its line of railway and paying the stipulated compensation therefor; hence the defendant was only a gratuitous bailee of the trunks. It is an admitted fact in this case that the salesman did not go to Glenwood on the same train which carried his trunks, and, further, that he did not intend so to do; but the evidence is to the effect that he intended to go to his home in Hudson, Wisconsin, remain there over Sunday and New Year's Day; then return to St. Paul Tuesday morning and go direct to Glenwood over the defendant's line; that when he checked the trunks he produced a mileage book good over the defendant's line, which consisted of a strip of two thousand ruled spaces or coupons, each evidencing the right of the passenger to travel on the line one mile, and have his baggage, not exceeding one hundred and fifty pounds, carried, the mileage coupons being on the left side of the ticket and the corresponding baggage coupons on the right; that the baggage agent detached baggage coupons from the ticket for the number of miles to Glenwood, and returned the ticket to the salesman with corresponding mileage coupons intact; that the agent was then paid by the salesman for the transportation of all of his baggage, the four trunks, in excess of one hundred and fifty pounds, with coupons from a separate baggage coupon book which the plaintiffs had bought and paid for; that one of the conditions of the mileage book was that, where baggage had been checked and baggage coupons detached, no further baggage could be checked on the mileage until the corresponding mileage coupons had been used for passage, thereby indicating that there might be cases where the passenger and his baggage would not go on the same train; and, further, that the salesman learned on Monday that the trunks had been burned at Glenwood the evening before, and returned to St. Paul, Tuesday morning, as he intended to, but was delayed in making up other sample trunks until evening, when he went to Glenwood over the defendant's line. Whether he used the same mileage book as that by which he checked the burned trunks, does not definitely appear from the record.

The defendant's contention is that the passenger must go on the same train with his baggage; otherwise, the carrier is only a gratuitous bailee of the baggage. This claim has the support of some respectable authorities. 3 Am. & Eng. Enc. (2d Ed.) 553; *Marshall v. Pontiac*, 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650, and notes, in which the soundness of the principal case is vigorously challenged. In view of modern methods of checking baggage and the custom of regularly checking it on the presentation of a ticket at stations, general ticket offices, and the homes of passengers, we are of the opinion that there is

now no good reason for the rule claimed, if ever there were, and hold that a railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage which it has regularly checked if the passenger does not go on the same train with it. The learned trial judge instructed the jury in this connection to the effect that if it was the *bona fide* intention of the plaintiffs' salesman when he checked the trunks to return to St. Paul Tuesday morning and go over the defendant's line to Glenwood, the defendant would not be a gratuitous bailee, but would be bound to use ordinary care, after the trunks were in the station house at Glenwood, to see that they were not lost or destroyed; but, on the other hand, if his intention was to defraud the defendant by getting it to carry his baggage without any intention of becoming a passenger over its line, it would be liable for the baggage only as a gratuitous bailee, and bound to exercise slight care for its safety, and only liable for gross neglect. This instruction was quite as favorable to the defendant as it was entitled to have it. The evidence is ample to sustain a finding that the salesman intended to follow his baggage and that the defendant was not a gratuitous bailee.

The evidence is practically conclusive that the defendant in any event received some compensation for the transportation of the trunks by the excess coupons surrendered, and that no fraud was committed upon the defendant. Such being the case, the instruction of the court as to the degree of care required of a gratuitous bailee was harmless error, of which the defendant cannot complain, even if it be conceded that the evidence would not sustain a charge of gross negligence.

3. The last contention of the defendant is that the evidence is not sufficient to sustain a finding that the defendant was guilty of negligence in caring for the trunks after they arrived at Glenwood.¹ . . . We have considered the evidence with care, and are of the opinion that it is sufficient to support the verdict. It follows that the trial court did not err in denying the defendant's motion.

Order affirmed.

SECTION III. SAFETY AND PROTECTION DURING PERFORMANCE.

LARNED v. CENTRAL RAILROAD OF NEW JERSEY.

SUPREME COURT OF NEW JERSEY, 1911.

[81 N. J. L. 571.]

PER CURIAM.

The plaintiff bought a ticket from New York to Elizabeth over defendant's railroad, and used it to check her suit case, containing clothing and personal articles, to Elizabeth, about noon on a Saturday. She then, instead of going to Elizabeth immediately, went elsewhere, and took a train for Elizabeth on that evening, arriving too late to claim her baggage and did not claim it until Monday morning, at which time it had disappeared. She sued the railroad company as a common carrier, and recovered a judgment in the court below for the value of the suit case and contents.

¹ So much of the opinion as discusses this point is omitted. — ED.

It is claimed that by reason of plaintiff failing to accompany her baggage on the same train, and especially by her failure to claim it for over thirty-six hours after its arrival, the liability of the railroad company became that of a gratuitous bailee, or at most that of a warehouseman, and that as there is no negligence made to appear, and also because the state of demand does not count on any liability but that of a carrier, the defendant cannot be held in this action. We are unable to accede to the view that because plaintiff did not accompany her baggage, the relation was not originally that of carrier and passenger so as to charge the company as a carrier of the baggage. It is true that many of the older authorities so hold; but the methods of railroad companies in the transportation of baggage have changed greatly of late years, even to the extent of running trains exclusively for baggage; and it is notorious in many cases, especially at certain seasons, the passenger has no assurance whatever that his baggage will go on the same train as that which he takes himself, even when checked in due season for that purpose. Baggage may be checked from house at starting point to another house at place of destination, and be transported quite independently of the train taken by the passenger. We think, therefore, that a railroad which checks baggage on a passage ticket and thereby assumes entire control of it, takes it primarily as a carrier; and the mere fact that the passenger does not take the same train as the baggage does not modify or change this *status*. With respect to the claim that the defendant was discharged from liability as a carrier by reason of the undue delay in presenting the check at destination, it may be said that this defence would be sustainable, no doubt, if it appeared that the undue delay had anything to do with the loss of the baggage; but as to this, nothing appears. For all that we know, or that the court or witnesses knew, the suit case may have been stolen from the baggage-room within ten minutes of its arrival. The defence of unreasonable delay is therefore irrelevant.

The judgment will be affirmed.

For the plaintiff in error, *George Holmes*.

For the defendant in error, *Abe J. David*.

IN THE COURT OF ERRORS AND APPEALS:

PER CURIAM. We are content with the reasoning adopted by the Supreme Court in this case. . . .

The judgment under review should be affirmed.

GOLDSTEIN v. PULLMAN COMPANY.

COURT OF APPEALS, NEW YORK, 1917.

[220 N. Y. 549.]

POUND, J. This action is brought to recover the value of a satchel and contents consisting of ordinary clothing and a diamond scarf pin. Plaintiff having paid for transportation and Pullman accommodation,

took the night train at about 10.30 o'clock at Cincinnati for Wheeling. The porter escorted him into the sleeping car, carrying the satchel and depositing it at the proper berth, which had been made up. Plaintiff before going to bed went into the wash room, taking his satchel with him, in order to prepare some changes in his linen so that he might be ready to leave the train when he reached his destination, at 5.30 o'clock the next morning. He there put his diamond scarf pin, eyeglasses, collar and tie into the satchel, took it back to the berth, left it in the aisle as the porter had left it and went to bed at about eleven o'clock. In the morning when he arose the satchel was gone. He notified the porter who aroused the sleeping Pullman conductor. They searched for it in vain. Wherefore he brought suit.

At the trial in the Municipal Court of the city of New York plaintiff gave proof of the above facts and rested his case, whereupon the defendant gave no evidence and moved for the direction of a verdict. The court dismissed the complaint for failure of proof. The Appellate Term of the Supreme Court for the first judicial department affirmed the judgment of dismissal. The Appellate Division reversed the determination of the Appellate Term and the judgment of the Municipal Court and ordered a new trial. Defendant appeals to this court by permission of the Appellate Division and with the proper stipulation for judgment absolute in case of affirmance.

The rule of law governing the liability of sleeping car companies for the loss of baggage, money or other personal effects of a passenger is not in dispute. The ground thereof is negligence. They are not insurers, held as such, without proof of negligence, to the strict accountability of innkeepers and common carriers of goods under the ancient rigid rule of the common law. (*Carpenter v. N. Y., N. H. & H. R. R. Co.*, 124 N. Y. 53; *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163.) The ground of responsibility is the same as to all passengers, whether they use sleeping berths or seats in an ordinary coach, though the degree of care required is different. (*Adams Case, supra*, p. 170.) The result of the controversy thus depends upon plaintiff's success or failure in making out a *pr ma facie* case of negligence. "The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given" (FOLLETT, Ch. J., in *Carpenter Case, supra*, p. 57); "more must be shown than mere loss." (*Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; *Whicher v. Boston & Albany R. R. Co.*, 176 Mass. 278.) The defendant urges that if the facts proved herein are held to constitute negligence on the part of the defendant, without other evidence explaining the disappearance of the satchel, the difference in the liability of innkeepers and sleeping car companies is obliterated and the latter are in effect held as insurers against theft. (*Springer v. Pullman Co.*, 234 Penn. St. 172.)

The rule is not so strictly applied against the passenger and in favor

of the sleeping car company. What is said as to mere loss as evidence of negligence in the two New York cases above cited must not be read too literally apart from the context. Plaintiff in the Carpenter Case proved only the familiar circumstances of the arrangement of a sleeping car, the stoppings of the train to take on and let off passengers and the varied duties of the solitary porter. If these facts are evidence of negligence, common knowledge and experience teach that negligence is so usual that proof is unnecessary to make the court aware of it. Facts of universal notoriety need not be proved. (*Brown v. Piper*, 91 U. S. 37.) The court then said that the evidence was sufficient to put the defendant to its proof and, in the absence of any explanation, to make a question for the jury, because the company was "bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers." In the Adams Case the learned judge wrote to establish the strict liability of passenger steamboat companies and to emphasize the distinction between such companies and the sleeping car companies. He concerned himself not with the rules of evidence but with the rules of substantive law.

The tendency in the more modern decisions in cases like this is to put the company on its defence when the loss is inconsistent with the proper care and the facts are in its possession, because "the thing itself speaks." Cullen, J., in *Griffen v. Manice* (166 N. Y. 188, 193, 194), writing of *res ipsa loquitur*, says that negligence may be established by proof of circumstances in all cases; that "it is not the injury, but the manner and circumstances of the injury, that justify . . . the inference of negligence;" that "where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation;" that, therefore, in proper cases the jury may be permitted to infer negligence from the accident and the attending circumstances in the absence of an explanation, and that these rules are general, not confined to any particular class of cases, but applicable wherever issues of fact are to be determined. The surrounding circumstances here suggest that a loss ordinarily would not happen if care commensurate to the duty of active watchfulness had been exercised, and the burden should shift to the defendant to show what degree of care and diligence was actually exercised.

Shifting the burden of explanation does not change the rule of liability. "Proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury" (*Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532, 538; *Hasbrouck v. N. Y. C. & H. R. R. R.*, 202 N. Y. 363), but the burden remains with the plaintiff of persuading the jury that his contention is right. (*Heinemann v. Heard*, 62 N. Y. 448; *Farmers L. & T. Co. v.*

Siefke, 144 N. Y. 354.) Where the liability is that of an insurer, proof of loss proves the case as a matter of judicial ruling and there is no risk of non-persuasion. (Adams Case, *supra*.)

The sleeping car company contends that it is not a bailee for hire unless it takes physical possession of the passenger's hand baggage and personal effects, as in the Hasbrouck Case, (*supra*). We fully agree with the learned court below that the question of possession at night should rest not so much upon the customary and somewhat casual handling of the baggage by the porter and his promises or assurances as upon the general obligations of the defendant. The possession of the company was not exclusive. It was charged with the duty of keeping an eye on the baggage rather than the duty of taking and keeping it for the owner to be returned to him when called for. Its duty was analogous to that of a servant and on historical grounds the servant is said not to have possession of the master's goods (Holmes, The Common Law, 277), while the liability of the bailee is based on possession. But it is unnecessary to make fine distinctions to determine the exact status of the sleeping car company. It is *quasi* bailee for hire and *quasi* watchman. In either capacity its duty at night when the passengers are at rest is one of vigilance so that the passenger may not lose his property through its inattention. When that duty is faithfully discharged, baggage does not as a rule disappear. The porter knows whether he "carefully and continually watched the interior of the car when berths were occupied by sleepers" and ought to be able to know where the plaintiff's baggage went between eleven o'clock at night and five o'clock the next morning, or to explain his ignorance. (Kates v. Pullman's Palace Car Co., 95 Ga. 810.) This is a fair rule. The tradition that juries invariably find against a corporation defendant if given the opportunity to decide the question of fact is obsolescent if not obsolete.

The order of the Appellate Division should be affirmed, with costs in all courts, and judgment absolute directed for plaintiff on the stipulation.

CHASE, COLLIN, HOGAN, CARDOZO and ANDREWS, JJ., concur
CRANE, J., not sitting.

Order affirmed.

CRAKER v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

SUPREME COURT OF WISCONSIN, 1875.

[36 Wis. 657.¹]

APPEAL from the Circuit Court for Sauk County.

Action for insulting, violent, and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial.

¹ This case is abridged.

The court refused a nonsuit, and instructed the jury, in substance, that if plaintiff, whilst a passenger as above stated, was abused, insulted, or ill-treated by the conductor of the train, defendant was liable to her for such injury as might be found from the evidence to have been inflicted. Defendant requested the court to instruct the jury, that upon the evidence plaintiff was not entitled to recover, "the acts of the conductor complained of not having been committed within the scope of his employment or in the performance of any actual or supposed duty;" but the instruction was refused.

Plaintiff had a verdict for \$1,000 damages; a new trial was denied; and defendant appealed from a judgment on the verdict.

RYAN, C. J. There can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it.

In *Bass v. Railway Co.*, we had occasion also to consider somewhat the nature of the obligations of railroad companies to their passengers under the contract of carriage; the "careful transportation" of *Railroad Co. v. Finney*. On the authority of such jurists as Story, J., and Shaw, C. J., we likened them to those of innkeepers. And, speaking of female passengers, we said: "To such, the protection which is the natural instinct of manhood towards their sex, is specially due by common carriers." In *Day v. Owen*, 5 Mich. 520, the duties of common carriers are said to "include everything calculated to render the transportation most comfortable and least annoying to passengers." In *Nieto v. Clark*, 1 Clifford, 145, the court says: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach." Long before, Story, J., had used this comprehensive and beautiful language, worthy of him as jurist and gentleman, in *Chamberlain v. Chandler*, 3 Mason, 242: "It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stip-

ulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil." These things were said, indeed, of passage by water, but they apply equally to passage by railroad. *Commonwealth v. Power*, 7 Met. 596.

These were among the duties of the appellant to the respondent, when she went as passenger on its train: duties which concern public welfare. These were among the duties which the appellant appointed the conductor to perform for it, to the respondent. If another person, officer or passenger or stranger, had attempted the indecent assault which the conductor made upon the respondent, it would have been the duty of the appellant, and of the conductor for the appellant, to protect her. If a person, known by his evil habits and character as likely to attempt such an assault upon the respondent, had been upon the train, it would have been the duty of the appellant, and of the conductor for the appellant, to the respondent, to protect her against the likelihood. *Stephen v. Smith*, 29 Vt. 160; *Railroad Co. v. Hinds*, 53 Pa. St. 512; *Commonwealth v. Power*, *supra*; *Nieto v. Clark*, *supra*; and other cases cited in *Bass v. Railway Co.* We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfil the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world: the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity.

We cannot think that there is a question of the respondent's right to recover against the appellant, for a tort which was a breach of the contract of carriage. We might well rest our decision on principle. But we also think that it is abundantly sanctioned by authority. *Railroad Co. v. Finney*, *Bass v. Railway Co.*, *Weed v. Railroad Co.*, *Nieto v. Clark*, *Railroad Co. v. Hinds*, and *Railroad v. Rogers*, *supra*; *Railroad Co. v. Derby*, 14 How. 468; *Moore v. Railroad Co.*, 4 Gray, 465; *Ramsden v. Railroad Co.*, 104 Mass. 117; *Maroney v. Railroad Co.*, 106

Mass. 153; *Coleman v. Railroad Co.*, 106 Mass. 160; *Bryant v. Rich*, 106 Mass. 180; *Railroad Co. v. Vandiver*, 42 Pa. St. 365; *Railroad Co. v. Anthony*, 43 Ind. 183; *Railroad Co. v. Blocher*, 27 Md. 277; *Railroad Co. v. Young*, 21 Ohio St. 518; *Sherley v. Billings*, 8 Bush. 147; *Seymour v. Greenwood*, 6 Hurl. & N. 359; *Bayley v. Railroad Co.*, L. R. 7 C. P. 415. There are cases, even of recent date, which hold the other way. But we think that the great weight of authority and the tendency of decision sanction our position.

By the Court. — The judgment of the court below is affirmed.¹

BATTON *v.* SOUTH AND NORTH ALABAMA RAILROAD CO.

SUPREME COURT OF ALABAMA, 1884.

[77 Ala. 591.²]

SOMERVILLE, J. The action is one of novel impression for which we nowhere find a precedent. It is a suit for damages against a common carrier — a railroad company — instituted by a passenger for the alleged negligence of the carrier in failing to protect the plaintiff, who was a female, and a single woman at the time of bringing the suit, against the nuisance of indecent language and conduct of certain unknown strangers, who proved disorderly in the presence of the plaintiff, while she was seated in the ladies' waiting-room of a railroad station, belonging to the road line of the defendant company. No assault on the plaintiff is shown, but only vulgar and profane language, and indecent exposure of person, and disorderly conduct, on the part of two or three intruders, who are in no wise connected with the defendant, as servants or agents.

It may be admitted that the plaintiff, Mrs. Batton, who, having married since suit was brought, unites with her husband in this action, was a passenger, inasmuch as she had purchased a ticket on the road, and had entered the waiting-room at the station, not an unreasonable length of time before the passenger train was due at Calera, *en route* for the place of her destination, which is shown to be the city of Birmingham. *Wabash R. R. Co. v. Rector*, 9 Amer. & Eng. R. R. Cas. 264; *Gordon v. Grand St. R. R. Co.*, 40 Barb. (N. Y.) 546.

The nuisance complained of appears to have been an extraordinary occurrence, and one which no officer or agent of the defendant company is shown to have been at the time cognizant, except a colored employee, or porter, whose duties were confined to looking after the baggage of the passengers.

¹ Compare: *Steamboat Co. v. Brockett*, 121 U. S. 637; *R. R. v. Kelly*, 92 Ind. 371; *Sherley v. Billings*, 8 Bush. 147; *Goddard v. R. R.*, 57 Me. 202; *Dwinelle v. R. R.*, 120 N. Y. 117. — Ed.

² Opinion only is printed. — Ed.

The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well-considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur. In *Britton v. Atlanta & Charlotte Railway Co.*, 88 N. C. 536 (18 Amer. & Eng. R. R. Cas. 391; s. c. 43 Amer. Rep. 748), the rule is stated to be, that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." We may assume this to be the law for the purpose of this decision, as it seems to be supported by authority. *New Orleans Railroad Co. v. Burke*, 53 Miss. 200; *Pittsburg R. R. Co. v. Hinds*, 53 Penn. St. 512; *Pittsburg R. R. Co. v. Pillow*, 76 Penn. St. 510; *Goddard v. Grand Trunk R. R. Co.* (57 Me. 202). 2 Amer. Rep. 39; *Cooley on Torts*, 644-645; *Nieto v. Clark*, 1 Clifford, 145; *Putnam v. Broadway R. R. Co.*, 55 N. Y. 108.

In the case of the *Pittsburg Railway Co. v. Hinds*, 53 Penn. 512, *supra*, the plaintiff, who was a passenger, sued the defendant company for an injury received by her at the hands of a mob, who, defying the power of the conductor, entered the cars at a wayside station, and commenced an affray, which resulted in an injury to the plaintiff. It was held not to be the duty of the railroad companies to furnish their trains with a police force adequate to such emergencies; the court observing that "they are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration." "It is one of the accidental risks," said Woodward, C. J., "which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter."

It cannot be said that this duty of carriers, to take due care for the comfort and safety of passengers, is to be confined to the management of their trains and cars; for the better view is, that it extends also, in a measure, to what has been termed "subsidiary arrangements." 2 Rorer on Railroads, 951. They are bound to keep their stations in proper repair, and sufficiently lighted, and to provide reasonable accommodations for the passengers who are invited and expected to travel their roads. *Knight v. Portland R. R. Co.*, 56 Me. 234; *McDonald v. Chicago R. R. Co.*, 26 Iowa, 124. The measure of duty is admitted by all the authorities, however, not to be so great as it is after a passenger has boarded the train, for reasons of a manifest nature. *Baltimore & Ohio R. R. Co. v. Schwindling*, 8 Amer. & Eng. R. R. Cas. p. 552, note.

We do not think that there is any duty to police station-houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability of a common carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an inn-keeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests. 2 Kent Com. 593*. There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe-carriage imposed upon the company no implied obligation to furnish a police force for the protection of passengers against such insults. It is shown neither to be commonly necessary nor customary. It was a risk which was incidental to one's presence anywhere when travelling without a protector, and it was the plaintiff's risk, not the defendant's.

We discover no error in rulings of the court, and the judgment must be affirmed.¹

POUNDER *v.* NORTH EASTERN RAILWAY CO.

COURT OF APPEAL, 1892.

[1892. 1 Q. B. 385.²]

APPEAL from a judgment of the judge of the County Court of Durham, holden at Hartlepool, in an action to recover damages from the defendants for assaults committed upon the plaintiff whilst travelling upon the defendants' railway.

The following statement of facts is taken from the judgment of A. L. SMITH, J. : —

¹ Compare : *Flint v. Transportation Co.*, 6 Blatch. 158; *Putnam v. R. R.*, 55 N. Y. 108; *Weeks v. R. R.*, 72 N. Y. 50. — ED.

² This case is abridged. — ED.

It was proved that the plaintiff, as one of the travelling public, took and paid for a third-class ticket for conveyance from Sunderland to Hartlepool by the defendant company, and that, when he did so, the company had no notice that he was exposed to any greater danger than one of the ordinary travelling public. As a matter of fact, the plaintiff was what in Durham of late has been known as a "Candy Hall man," that is, a man engaged upon the eviction of pitmen from their houses consequent upon disputes between them and their masters. For this reason the plaintiff had incurred the ill-will of pitmen in parts of that county, and was in danger of being molested by them. Having taken and paid for his ticket, the plaintiff, accompanied by two other "Candy Hall men," attempted to ride in the guard's van; but they were not allowed to do so, it being against the company's rules that this should be done, and the plaintiff and his two friends were placed by a servant of the company in a third-class carriage in which were then seated six or seven unexceptional passengers. The carriage was constructed to hold ten people. Evidence was given that at this time the company's servant was aware that the plaintiff was a "Candy Hall man," and that he feared violence from pitmen at the station; that after the plaintiff was seated in the carriage six or seven pitmen did rush in; that the company's servants did nothing towards either attempting to get the pitmen out, or to get the plaintiff a seat in another carriage, and that the train started with the six or seven pitmen in the overcrowded carriage in which the plaintiff and his two friends were travelling; that during the journey to the first station at which the train stopped, viz., Ryhope, the plaintiff was assaulted by the pitmen; that at Ryhope these pitmen got out, and that another relay of pitmen then got in, and repeated the assault upon the plaintiff. For these assaults, which were obviously the independent acts of the assailants, wholly unconnected with the company, the action was brought against the company, and the county court judge held the defendants liable, and assessed the damages at £5.

The county court judge stated that he was of opinion that the allowing the carriage to be overcrowded, and especially after notice that the pitmen were threatening and intending to assault the plaintiff, and also the not removing either the pitmen or the plaintiff from the carriage at two different stations, was negligence on the part of the officers or servants of the defendants, and that the assault was the consequence of such negligence, and under the circumstances not too remote.

A. L. SMITH, J. In this case the plaintiff has recovered damages against a railway company for a series of assaults committed upon him by fellow-passengers whilst travelling upon the defendants' line. The mere statement of the case denotes its novelty; but it is insisted that there was evidence which supported the judgment of the learned county court judge; and, so far as it is material, it is as follows:—[The learned judge stated the facts as previously set out]. The cause of

action, if any, which the plaintiff had against the defendants was for an act of omission, and this cannot be supported unless the plaintiff can in the first place establish a duty upon the defendants to do that which it is said they have omitted to do. What is the duty of a railway company to its passengers? It arises out of the contract, and must be determined upon the facts known to the contracting parties at the time of the contract. Ordinarily it is the duty of a carrier of passengers arising out of the contract of carriage to carry the passenger upon the contracted journey with due care and diligence, and to afford him reasonable accommodation in that behalf. If the carrier omits to perform either of these duties, he is responsible for the ordinary consequences arising to the ordinary passenger therefrom. There is no duty in these circumstances to take extraordinary care of a passenger by reason of an unknown peculiarity then attaching to him. It is said in the present case that the defendant company committed a breach of duty in allowing the carriage in which the plaintiff was travelling to become overcrowded, and that consequently they omitted to supply him with reasonable accommodation, which the House of Lords, in the case of *Jackson v. Metropolitan Ry. Co.*, 3 App. Cas. 193, had held to be evidence of negligence — i.e., breach of duty on the defendants' part. Be it so. But the obligation which the defendants undertook when they contracted with the plaintiff was that, if they omitted to supply him with reasonable accommodation, they would be liable for the consequences usually arising therefrom to one of the travelling public — not for consequences which might result to a man who required, whilst travelling, special protection for his safety, and which fact was unknown to the company when they contracted to carry him. To an ordinary passenger the consequences of not supplying reasonable accommodation, which is the breach of duty now set up, is certainly not his being assaulted by an independent tortfeasor, which is the sole injury or loss complained of in the present case. The cases put in argument of the company putting a known lunatic, or a known biting dog, or a known leper, or a man known to be drunk and quarrelsome, into a carriage with one of the ordinary travelling public, have no bearing upon the present case, for the consequences likely to arise therefrom would be well known to the company when they contracted to carry the passenger. The consequences likely to arise from putting pitmen to travel with a passenger, at the time of the contract believed to be one of the ordinary travelling public, would not be that the pitmen should break the law and assault their fellow-passenger. This is the difference between the cases. For the reasons above, and I do not say there are not others, the judgment of the county court judge must be reversed, and judgment entered for the defendants, with costs here and below.¹

¹ See *Cobb v. Great Western Ry.*, [1894] A. C. 419; *Chicago & A. R. R. v. Pillsbury*, 123 Ill. 9.—Ed.

PUTNAM *v.* BROADWAY AND SEVENTH AVENUE
RAILROAD.

COURT OF APPEALS, NEW YORK, 1873.

[55 N. Y. 108.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff entered upon a verdict.

This action is brought to recover damages for the death of Avery D. Putnam, plaintiff's intestate, who was killed by William Foster, the complaint alleging that defendant's negligence caused such death.

On the 26th April, 1871, Putnam took passage on one of defendant's cars, at Eighth street, in the city of New York, in company with two ladies, Mrs. Duval and her daughter. They seated themselves at the front end of the car, on its westerly side. When the car reached the neighborhood of Sixteenth street Foster jumped on the front platform. Foster remained quietly on the front platform, the car door being shut, until the car approached the vicinity of the Gilsey House, at Twenty-ninth street. Putnam here called the attention of Miss Duval to the Gilsey-House clock, and she went to the door. Mrs. Duval herself crossed to the easterly side of the car. As Miss Duval stood looking through the car door Foster made insulting signs at her. After insulting and annoying the ladies in various ways, Foster entered the car and attempted to sit down in the space between Miss Duval and the door. Mr. Putnam then said: "Conductor, can't you make this man be quiet?" The conductor said to Foster: "Sit down and be quiet." The conductor came from the rear platform at the time Mr. Putnam spoke, and after the conversation he returned thereto. After the conductor spoke to him Foster sat down in the front end of the car with his feet toward Mr. Putnam, but not touching him, and commenced making remarks to Mr. Putnam "under his breath," not loud enough to be heard by Mrs. Duval on the opposite side of the car. Mr. Putnam did not pay any attention to him, except saying, as he turned his back to Foster, "If I had thought you were in liquor I should not have had anything to say to you." Foster afterward said to Putnam in a low tone, "Before you leave this car I'll give you hell," and then opened the front door and passed out of the car on to the platform, leaving the door open. Putnam shut the door and resumed his seat. Nothing further occurred until the car reached Forty-sixth street. When the car neared Forty-sixth street it stopped for Mr. Putnam and his party to leave the car. Mr. Putnam got off first, and Foster got off at the same time, and running around from the front of the car assaulted Mr. Putnam, as he was assisting his companions to alight, with a car hook, striking him two blows on the head, from the effects of which Mr. Putnam subsequently died.

ALLEN, J. The questions presented upon this appeal are founded upon exceptions to the refusal to nonsuit the plaintiff at the close of the trial. If the evidence upon any view that can be taken of it entitled the plaintiff to a verdict, the judgment must be affirmed. The case was submitted to the jury with great fairness, and with accurate instructions as to the law, if there was in truth any evidence of a neglect of duty, or want of care on the part of the servants and agents of the defendant to which the injury to and death of the plaintiff's intestate could legally be attributed.

The cases bearing upon the liability of railway companies, and other carriers of human beings as passengers for hire, for any defect in their roadways, carriages and other vehicles of transportation, any neglect or want of care by themselves, their agents or servants in the performance of the service undertaken, and for injuries caused by or resulting directly from the acts of the carrier or his servants, either to the passenger or third persons, may be laid out of view, except as they serve to indicate the stringency and extent of the liability imposed by law upon carriers, and the extreme care and diligence required of them, in all that concerns their own acts and the agencies and means employed by them. The acts, neglects and omissions complained of here, upon which the action is based, do not come within either class of cases referred to. The passenger was carried in a safe and proper manner, and there is no complaint of injury from any defect in the means of conveyance, or any act or omission of duty on the part of the servants of the company in respect to the plaintiff's intestate personally. The wrong and injury complained of is the wanton and unprovoked as well as unlooked-for attack of a fellow-passenger, resulting in the death of the individual assailed, and the defendant is sought to be charged for the resulting damages on the ground that the servants and agents of the company, in charge of the car, negligently and improperly omitted to exercise police powers with which they are invested for the protection of well-disposed and peaceable passengers.

There is no such privity between a railway company and a passenger as to make it liable for the wrongful acts of the passenger upon any principle. *Pittsburgh, F. W. & C. R. Co. v. Hinds*, 53 Penn. St. R. 512. But a railroad company has the power of refusing to receive as a passenger, or to expel any one who is drunk, disorderly or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety, or annoying others; and this police power the conductor, or other servant of the company in charge of the car or train, is bound to exercise with all the means he can command whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible.

Pittsburgh, F. W. & C. R. Co. v. Hinds, *supra*, Flint v. Norwich & N. Y. Transportation Co. 34 Conn. 554; 6 Blatch. C. C. R. 158. In the case first cited, a passenger was seriously injured by a large body of drunken and riotous persons, who came upon the train in defiance of the conductor in charge; and the court in banc held that, upon the evidence in that case, the only question which should have been submitted to the jury was whether the conductor did all he could to quell the riot and eject the rioters, and that if he did not the company was liable. The judge at *nisi prius* having submitted other questions, to wit, whether the conductor allowed improper persons on the train, and whether he allowed more persons on the train than was proper, a verdict for the plaintiff was set aside, and a *venire de novo* ordered. In the other case, the action was for an injury received by the plaintiff, a passenger on the defendants' steamboat, from the falling and consequent discharge of a loaded musket, by one of a great number of riotous and drunken soldiers engaged in an affray, and occupying a part of the boat assigned to passengers, the plaintiff being suffered to enter the boat and pass to this part of it without any warning from the officers of the boat, or others, of the presence of these soldiers, and the defendants making no effort to preserve the peace or remove the offenders. Upon conflicting evidence the jury found for the plaintiff. Judge SHIPMAN in his charge to the jury instructed them that "the defendants were bound to exercise the utmost vigilance in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." This, as a rule of duty and liability, is in strict analogy and consistent with the rules by which the liability of common carriers of persons for hire is determined in other cases and seems to be well expressed and, properly limited. It may be conceded that Foster, the individual who inflicted the injury resulting in the death of the plaintiff's intestate, was drunk when he came on the car; but so long as he remained quietly by the driver on the platform, neither entering the car, nor molesting or annoying the passengers in any way, there was no occasion for removing him, and the conductor would not have been justified in refusing to permit him to remain as a passenger. The fact that an individual may have drunk to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion.

While Foster remained on the platform of the car, neither interfering with or noticing the other passengers, there was nothing to indicate to the conductor that his presence was offensive to the passengers, or that there was danger of harm to any one from him. There was during that time no occasion, and would have been no propriety, in causing his removal from the car. He did, however, thereafter make himself

peculiarly obnoxious to the other passengers, and by his conduct and demeanor grossly insult and annoy them, and gave occasion for the exercise of the power of removal, had the conductor seen fit, or been called upon to exercise it; and had he continued his annoying practices the conductor would have been faithless to his duty had he suffered him to remain on the car. After Foster came into the car, and insulted and intimidated the females under the protection of the deceased, the latter appealed to the conductor, not to exclude Foster from the car, but to make him be quiet, and the conductor directed him to sit down and be quiet, and he did thereupon take a seat on the opposite side of the car from the females, and near the deceased, and after remaining there a short time left the car, and took his place on the front platform, the front door of the car being closed, and, during the residue of the passage to Forty-sixth street, gave no occasion of complaint so far as appears. He was during that time peaceable and inoffensive. During this latter part of the ride there was no occasion for removing him from the car, unless the occasion and a necessity for such removal was furnished by his previous conduct, showing that he was a dangerous or improper person to remain. He had ceased to address or in any way to insult or annoy the females, upon being requested by the conductor to sit down and be quiet; and his ready compliance with that request, and his taking his place soon thereafter on the platform, and proceeding quietly and peaceably on his journey, was some evidence that there was no reason to apprehend a renewal of his insults in that direction, and justified the conductor in at least giving him the benefit of a further probation. This was precisely in accord with the suggestion of the deceased; neither he or the conductor apprehending any serious harm or injury, certainly not a wanton and murderous attack upon any one with a dangerous weapon. It is true that, on taking his seat, he did not observe the strictest rules of propriety, and, by putting his feet on the seat, violated good taste and good manners; but it was not an offence of which the passengers could very seriously complain, or which essentially violated their rights, so long as there was abundant room for all, and there was no indecency in the position. This breach of good manners certainly did not tend to show that he was a dangerous man, and was condoned by his subsequent withdrawal from the seat and the body of the car entirely. It is also in evidence that, while seated near the deceased, he directed abusive language to him, and made threats indicating an intent to do him some bodily harm before he left the car. But all this was in an undertone, and, so far as appears, was unheard by the conductor, occupying his proper place on the rear platform, and neither the deceased nor any one else called the attention of the conductor to it. It was probably treated with indifference by the deceased and all who heard it, and regarded as the maudlin and senseless gabble of a drunken man, unworthy of notice, and incapable of creating any apprehension of danger or harm. But he

this as it may, there is no evidence to justify an inference that the conductor did hear, or could have heard or known of the abuse or threat, so that to him they were not evidence that he was an unsafe and dangerous man, or that there was any reason to apprehend injury to the other passengers from him or his acts.

The conductor was only called upon to act upon improprieties or offences witnessed by him, or made known to him in some other way, and the defendants can only be charged for neglect of some duty arising from circumstances of which the conductor was cognizant, or of which he ought, in the discharge of his duties as conductor, to have been cognizant.

There was no evidence tending to show that the conductor was in fault for not removing the person of Foster from the car. He exerted his police powers by causing him to desist from his offensive acts and approaches toward the females, and supposed that he had done all that was necessary to preserve the peace and keep good order upon the car, to secure the other passengers against further annoyance, as well as all that the deceased asked him to do. If the peace could be preserved and the quietness and comfort of the passengers could be secured, as he supposed he had done, without the expulsion of the offender, the conductor could hardly have been called upon to proceed to extremities and put the latter from the car by force. An unnecessary resort to force, in ejecting a passenger from the car, might have given the passengers, male as well as female, more pain and annoyance than would the mere presence of a drunken man, and possibly might have seriously imperilled their persons. There was no evidence of any neglect of duty on the part of the conductor in omitting to remove the person of Foster from the cars; and whatever may be the duties or powers of the driver, except as he is in subjection to the conductor, there is no evidence that he had any notice or knowledge of any impropriety of conduct or the threatening language on the part of Foster, except as he must have witnessed what passed before Foster entered the car. There is no evidence that he had knowledge of what transpired within the car; and after Foster's return to the platform, there was nothing, so far as appears, to excite alarm, or create apprehension of danger or disturbance or annoyance of any kind. There was an entire absence of evidence of any connection or complicity of the driver with Foster, or that the driver was responsible for the possession by the latter of the iron instrument with which the blows were inflicted that caused the death of Putnam. There was no proof from whence or of whom Foster obtained it, and none to show that the driver either acquiesced in or assented to the taking of it by Foster, or that he knew that Foster had it. There was no evidence of negligence or omission of duty, or want of proper care and vigilance on the part of the servants and agents of the company in preserving order and keeping the peace on the cars, and protecting the passengers, to be submitted to the jury; most certainly, none connected with the attack upon and death of the

intestate, or to which it can be legally or logically traced. The rule cannot be better or more concisely expressed than as stated by Judge SHIPMAN in *Flint v. Norwich & N. Y. Transportation Co.* (*supra*): "That for any neglect or omission of duty in the preservation of order and the removal of dangerous and offensive persons by the owner of a public conveyance for the transportation of passengers, or his servants or agents, the carrier is liable for any injury to other passengers which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." It does not follow and cannot be presumed that because a man is drunk and is, in that condition, offensive to others, as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence imperils the safety of others; that because he is drunk he may violently assault or murder others without provocation.

If there was anything in the condition, conduct, appearance or manner of Foster from which the jury could reasonably infer that there was reason to expect or anticipate an attack upon the deceased, or any other passenger, either while upon the car, or in the act of leaving, the facts authorizing such inference should have been proved, and knowledge of them brought home to the conductor. The injury to and death of Mr. Putnam was immediately and directly caused by the murderous attack of Foster, and the carriage of the murderer by the defendant had no connection with and did not cause the act or directly contribute to it.

It is said in *McGrew v. Stone* (53 Penn. St. R. 436) that the general rule is that a man is answerable for the consequences of a fault, which are natural and probable; but if his fault happen to concur with something extraordinary and not likely to be foreseen, he will not be answerable.

Ch. J. BOVILL, in *Sharp v. Powell* (L. R. 7 C. P. 253), uses this language: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are by reason of some existing cause likely to intervene so as to occasion damage to a third person." The law ordinarily looks only to the proximate cause of an injury, in holding the wrong-doer liable to an action; and if the damage is not the probable consequence of a wrongful act, it is not the proximate cause, so as to make the wrong-doer liable. See *Marsden v. City and County Assurance Co.*, L. R. 1 C. P. 232; *Bigelow v. Reed*, 51 Maine, 325; *Railroad Co. v. Reeves*, 10 Wallace, 176. This is the rule in cases of *tort*, when the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to vindictive or exemplary damages. *Baldwin v. U. S. Tel. Co.*, 42 N. Y. 744; *Boyle v. Brandon*, 13 M. & W. 738.

The assault by Foster upon the deceased could not have been foreseen, and it was not the reasonable or probable consequence of the omission of the conductor to eject him from the car, and upon principle as well as upon authority the injury was too remote to charge the defendant for the damages. In *Scott v. Shepherd* (2 W. Bl. 892), *Guille v. Swan* (19 J. R. 381) and *Vandemburgh v. Truax* (4 Den. 464), the injuries were held to be the natural and direct result of the conduct of the party charged, although he did not intend the particular injury which followed.

There was no evidence to carry the case to the jury, and the motion for a nonsuit should have been granted.

The judgment must be reversed, and a new trial granted.

All concur.

*Judgment reversed.*¹

WEEKS v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD.

COURT OF APPEALS, NEW YORK, 1878.

[72 N. Y. 50.]

FOLGER, J.² . . . We must treat the action as the court and counsel treated it at the trial, and for aught that appears upon the record, as it was treated at the General Term, as one to recover of the defendants the value of the bonds lost and never restored.

Then the case is this: The plaintiff bought of the defendant the ordinary passage ticket, and paid for it the usual price. By that act the defendant assumed to him the duty of carrying him and his ordinary baggage — that is, his ordinary clothing, articles of personal convenience, usual ornaments, and money for his personal expenses. He carried in his clothing, upon his person, without the knowledge of the defendant, without any notice to it, as matter of fact solely in his own care and custody, a package of negotiable securities of much value. These securities were taken from him, in the car of the defendant, by the violence of men who had no connection with the defendant, and whose presence upon the car was not known to the defendant, though it might have been; and the jury have found that he was not guilty of negligence contributing to his loss, and that the defendant was guilty of negligence in not caring for the protection of the plaintiff from violence while on its car, and that because of that negligence the robbery took place.

If the claim of the plaintiff is to be sustained, it must be held that, from the circumstances of the case, the defendants owed such duty to the plaintiff as that it was an insurer of the safe carriage of his securi-

¹ See *Connell v. Chesapeake & O. Ry.*, 93 Va. 44. — Ed.

² Part of the opinion only is given. — Ed.

ties, in the mode of carriage adopted by him, and for no greater consideration than the usual price or compensation paid by any passenger on its vehicles, and without knowledge or notice that he had them upon his person.

The mind conversant with legal topics, and wont to look at the consequences of the laying down of a rule of law, and the lengths to which it may logically be carried, does not readily yield assent to that proposition, and inquires upon what principle the liability of the defendant is sought to be established. It is apparent that if the carrier is liable in such case for a loss by robbery, it is liable also for a loss by theft by strangers (see *Abbott v. Bradstreet*, 55 Maine, 530); or for loss resulting from negligence in any way, no matter what the character of the valuables, or the amount of them borne upon the person, and in the sole care and custody of the passenger. It is then seen that the carrier of passengers, against its will, with no knowledge or notice of the charge and risk put upon it, becomes more in fact than a carrier of passengers; it becomes an "express" carrier of packages of value. It becomes such "express" carrier with unusual burdens. It is without knowledge of the value for which it is liable. It is not given the custody of the package. It is liable to be the subject of false and fraudulent claims of individuals; and of false and collusive claims of conspirators; and the victim of wicked plans, sustained by made-up testimony. This, perhaps, partakes of the argument *ab inconvenienti*. But it is a maxim: *Argumentum ab inconvenienti, plurimum valet in lege*. Good authority says that arguments, in doubtful cases, drawn from inconvenience, are of great weight. *Per* HEATH, J., *Steel v. Houghton et ux.*, 1 H. Bl. 51-61; *Doe, ex dem., v. Acklam*, 2 B. & C. 779-798; *per* DALLAS, J., *Deane v. Clayton*, 7 Taunt. 489-527. And this argument is worthy of notice in this case against a carrier of passengers only, for it was in use in olden time against a carrier of goods, to found the law of his duty and liability. The carrier of goods is now held liable for the loss of goods stolen from him, though without his negligence. The rigor of the law in this respect arises from reasons of public policy (which is another phrase for public convenience), and to prevent the combinations that might be made with thieves and robbers. *Schieffelin v. Harvey*, 6 J. R. 170-177, and cases there cited. It would seem that it should have another side, too, and be applied in favor of a carrier of passengers to protect him from risks which he has not knowingly assumed. And as is well said, at General Term, "the rule limiting the liability of the carrier to a reasonable amount of money to meet the expenses and conveniences of the traveller, would be so completely evaded as to be practically nullified." The inquiry for a principle for the proposition of the plaintiff to rest upon, is made with more doubt of a convincing answer, for the reason that there is a principle at the foot of the obligation or duty of a common carrier, which seems adverse to the right of action of the plaintiff. A common carrier is bound, in that his occupation is in its nature a public one, to carry all that is offered to

him for carriage in the line of his particular branch of service. For this he has a right to demand a reasonable compensation. The amount of that compensation must in reason vary, as the amount of risk which he takes is varied. And he who employs the carrier is bound not to conceal from him the facts in his case, which materially increase that risk. *Pardee v. Drew*, 25 Wend. 459. And if he does conceal, it is a fraud upon the carrier if he is to be subject to a liability so much greater than he contracts for, or than he is bound to suppose is assumed by him. *Sewall v. Allen*, 6 Wend. 335; *per* CHANCELLOR, p. 349; *Nat'l Bk. v. M. & C. R. R. Co.*, 20 Ohio St. 259. Now, it is apparent that the defendants would not have engaged with the plaintiff to carry safely those securities, left upon his person and solely in his custody, at no more than the usual rate of compensation for the carriage of a passenger and his ordinary baggage and travelling paraphernalia. And inasmuch as it would not, and could not have been compelled to have so engaged, without an increase of remuneration, it follows that taking him with the valuable securities with which he was induced, it, in ignorance and unnotified thereof, owed him no duty as a general rule of its occupation to give to him and his property more than the usual care demandable from it by any passenger. In such case, in legal contemplation, the thing of value is not in the charge of the carrier as such, and he has made no contract and entered into no duty in regard to it. This is upon the assumption, for the purposes of the case, that, though as to the plaintiff it was a carrier of passengers only, it might be compelled to take the charge, for the journey, of articles not a part of a passenger's ordinary baggage and equipment, and yet of high value. It is at least doubtful whether, had the plaintiff given the defendant notice of his intention of carrying with him these securities of value, it could have been compelled to have undertaken the safe carriage and sure delivery of them, or that it was any part of its duty so to do. *Sewall v. Allen*, 6 Wend. 335.

The plaintiff seeks to base the right to recover of the defendant upon the ground that it was bound to protect the passengers in its cars from open invasion, and forcible assault, injury and robbery. We do not need to deny this proposition here. We need not shrink nor stretch the rule laid down in *Putnam v. B'way & Seventh Ave. R. R. Co.*, 55 N. Y. 108. A carrier of passengers is bound to exercise the utmost vigilance in maintaining order and guarding his passengers against violence. *Id.* But if he neglects to do so, for what is he liable? His liability arises upon contract, expressly made or implied from his duty; or from the duty of his employment, public in its nature. It is plain that the plaintiff and defendant here, made no express contract in relation to these securities. Whatever contract the sale and purchase of a passenger ticket expresses, it does not make a contract which was not in the mind of both the parties, or imputable to them by law. We have shown that the law does not impute a contract to carry for a passenger other goods than ordinary baggage; and as the defendant had no knowl-

edge or notice of these securities, it could not have had intention to engage for the carriage and delivery of them. If the plaintiff is to recover, it must be *ex delicto*, upon the duty of defendant. A public carrier of goods is bound to vigilance, and may set up as an excuse for want of safe carriage and sure delivery, nothing but an exempting act of the shipper, an act of God, or of the public enemy. Yet if the shipper conceal from the carrier, or fail to notify him, that in a package of mean appearance is placed an article of great value, the ordinary negligence of the carrier may sustain a judgment for what a passenger usually carries, but will not warrant a recovery by the shipper of the worth of his property of great price. *Miles v. Cattle*, 6 Bing. 743. The carrier of goods, in the absence of express agreement, is liable, by reason of his negligence, for damages to such amount as would ordinarily be expected to result therefrom. So, though a carrier of passengers is bound to guard one going in his vehicle from violence, the damages he must pay, if he neglects his duty, are such as would ordinarily result therefrom, as would naturally be contemplated by the parties on making their contract, or assuming their relative rights and obligations. Such a carrier is bound to take the passenger, and to carry together with him his luggage, reasonable in size and weight, and in kind and value of the articles filling it such as is naturally and usually required by a passenger, and reasonable for his personal use while on the way or at his place of destination. Should that luggage be lost by the carrier, or misdelivered, or stolen from him, though it may contain large sums of money or articles of great value, or things not destined for personal use, the carrier is not however liable for them, but for so much of the contents as falls within the classification we have given above. In the same way, (though, we do not pass authority upon it,) should a passenger be assailed in the vehicle of the carrier in such circumstances as that it was a breach of the duty of the latter, that it failed to protect the former from violence, and should he be robbed of portions of his clothing, or usual and reasonable articles of personal ornament, his watch, or his purse with the money for his travelling and other personal expenses, it may be that the carrier would be liable for the loss which its passenger had sustained. But if the passenger had seen fit privately to place and carry upon his person securities or articles of great value not falling within the above category, without the knowledge of or notice to the carrier, and in the melee they should be lost or stolen, the latter is not liable for them. He has entered into no especial contract to carry and deliver them. He owes no duty in regard to them, by reason of his public calling that is not fulfilled, so long as he is free from gross negligence and fraud. The absence of notice to him of the purpose to carry them has prevented him from exacting a reasonable compensation for the carriage; and, what is more, from making provisions for safety in measure with the increase of the hazard incurred. For the carriage of himself, his watch, his purse, and the like, the passenger does, perhaps, make contract with

the carrier; or so does set in operation the duty of the latter, when he buys his ticket or takes his passage; and does, it may be, legally demand of him a care and diligence up to the needs of the hazard, and render him liable for such damage as is in the contemplation of the contract or the scope of the duty. We have of late, at some length, considered some questions having an intimate relation with this, and refer to that case for some authorities. *Magnin v. Dinsmore*, 62 N. Y. 35.

The learned counsel for the appellant concedes and contends that the property stolen in this case, is not to be considered as baggage, or to be governed by the rules which have been laid down as to the loss of that and liability therefor. He puts the right to recover upon the duty of the carrier to protect the person of the passenger from violence. Is it logical to say that the defendant is not liable for the loss of these securities as baggage, or as goods, wares and merchandise; that is, that the presence of them in the car in the character of a valuable thing did not create a duty as to them, but that, by the fact of their being on the person of the plaintiff in the car, there arose from the duty to care for his person a duty to care for them? They were nothing else on his person than off of it. They did not become a part of his person, and thus evoke a duty to care for them as a part thereof. They were still property, extraordinarily in the vehicle of the defendants. Nor do we see how the fact, that the loss occurred through violence to the person of the plaintiff from other men, rather than from accident, makes a difference in the case. The defendants are bound to protect the plaintiff from the violence of a railway accident, as well as from the intentional violence of ruffians and rogues. Would it be claimed that if, in the occurrence of a railway accident, these securities had become lost from the person of the plaintiff in any of the many ways that may be imagined, with no other human intervention than was concerned in the accident itself, that the defendant would have been liable for the loss? Such a case has been adjudicated in the negative, after ingenious argument and well-considered opinion. 20 Ohio St., *supra*. To hold otherwise, would be to extend the liability of the carrier to a new matter, by reason of the human violence and the injury therefrom; making the character alone of the act create a new duty. The carrier of passengers is liable for harm to their persons from the violence of intruders, when he has been negligent in his duty to protect from it. He is liable for harm to their property, when he has been negligent in his care of it, if confided to his care, either in fact or in law. His negligence is thus the ground of liability in both cases. But the proposition contended for would make the negligence, by which violence comes to the person and property of the passenger from other human beings, far more extensive in its consequences than the negligence by which violence comes to the person and property, or to the property alone, from inanimate things. We see no reason for this.

We have confined our consideration to the ground taken by counsel,

with such illustrations and arguments drawn from kindred topics as seemed profitably to bear upon the subject. We have not thought it well to rely upon a rule laid down in *Tower v. U. & S. R. R. Co.*, 7 Hill, 47; although there the article lost was a part of a passenger's clothing, and was taken by him into the car of the defendant and kept in his own custody; for the reason that there was in that case no element of violence to the passenger and loss of property thereby, and because the case is also put upon the negligence of the passenger in the care of his property, which we cannot assume in this case.

There are some cases cited by counsel, in which the learned judges in their opinions have used phrases to the effect that the carrier is liable for *all the injury*, or for *any injury* sustained. *Fitch v. Norw. Tr. Co.*, 6 Blatch. 158; 55 N. Y. 108, *supra*. In those cases the cause of action was solely for injury to the person, and the remarks were appropriate. They are not to be applied to a case of this kind. Like "every other proposition laid down by a judge, they ought to be understood with particular reference to the facts of the case then before the court." *Per* Ld. ELLENBOROUGH, C. J., *Hunter v. Prinsep*, 10 East, 392. It is intimated on the points of the learned counsel for the appellant, that the jury might have found that the plaintiff carried a bond with which to raise the money for his journey. If it is meant that such a consideration as this would require the submission of the case to the jury; it suffices to say that there is no such hint in the testimony upon the trial, and it would not have been right for the court to have submitted such a question to the jury.

From our consideration of the case, it is our judgment that the valuable securities carried by the plaintiff were not a part of the property, which he could in his ordinary relation of passenger of the defendant bear about his person at its risk, and under its duty as a carrier to protect him and his necessary, convenient and ornamental, reasonable, personal chattels and money; that for that reason the value of them does not properly enter into an estimate of the damages with which it should be charged, on a recovery by him against it for not protecting him from violence while he was rightfully on its car, it being assumed to be guilty of negligence therein, and he being taken as free from contributory negligence. It was error, then, under the circumstances of this case, to submit any question to the jury. The complaint should have been dismissed. We think that the question we have determined was fairly presented by the motion to dismiss the complaint, on the ground that this "injury and grievance is too remote to charge the defendant with damages." and that, "under all the circumstances of the case, the plaintiff has no legal ground for a recovery" against it.

The order for a new trial must be affirmed, and judgment absolute given for the defendant on the stipulation.

All concur, except CHURCH, Ch. J., absent, and ALLEN, J., not sitting.
Order affirmed and judgment accordingly.

SKINNER v. ATCHISON, TOPEKA AND SANTA FÉ
RAILROAD CO.

CIRCUIT COURT OF THE UNITED STATES, 1889.

[39 Fed. 188.]

ON October 13, 1887, plaintiff, a lady 45 years of age, was a passenger over the defendant's railroad, travelling from Kansas City to Wellington, Kan. At Newton, an intermediate station, she was obliged to alight and change cars. Being notified by the station agent that the train for Wellington was ready, she started to take her place in the passenger coach. Her testimony was that as she ascended the steps she saw a brakeman suddenly climb the rails of the car platform, as if to adjust the bell-rope, and that almost simultaneously with his ascending the rails he fell backward upon her, crushing her left hand with his foot, and inflicting other serious injuries. A witness for plaintiff testified that he preceded the plaintiff up the steps, and that the brakeman was standing upon the rails, adjusting the bell-rope, when the witness began to ascend the steps. This witness' attention was first attracted by a cry from the plaintiff, and, turning quickly around, he saw the brakeman in the act of falling. Two other witnesses for the plaintiff saw the brakeman about the instant he came in contact with the plaintiff. One of them had not noticed the brakeman before, the other testifying that he saw the brakeman suddenly appear, (but could not tell whence,) and quickly climb the rails in the manner testified to by the plaintiff. At the close of the plaintiff's case defendant moved the court to exclude the evidence. This motion was overruled *pro forma*, and the defendant introduced the evidence of the brakeman, who testified that in the course of his duty, and in the usual and ordinary method, he was adjusting the bell-rope while standing, not upon the rail at the outer edge of the platform, as plaintiff's witnesses testified, but upon the two rails attached to the end of the body of the car, one on each side of the door. While in this position, his legs spanning the opening of the door, he was jostled or run into by some one from within the car: his right foot was pushed off from the rail, and in the effort to regain his balance he fell upon the plaintiff. At the conclusion of this evidence defendant renewed the motion for the court to direct a verdict for the defendant.

JENKINS, J., (*orally*.) In disposing of this motion the court is obliged to consider the evidence in the light that is most favorable to the plaintiff, and give to the plaintiff the benefit of all the inferences from the facts which the jury would have a right to draw. The facts are within small compass. The plaintiff was a passenger, and was entitled to the protection of a passenger from the defendant, and was entitled from the defendant to the highest degree of practical skill and care to protect her from injury. So far as the evidence discloses, everything connected

with the train was in perfect order. She was ascending the steps of the car, lawfully, upon invitation from the official who supervised the station where the train was standing, and upon reaching the second step she was injured by the falling of this brakeman, who, in the discharge of his duty, had ascended the rail for the purpose of coupling the bell-rope. The court must assume that the version which the plaintiff gives of that transaction is the correct one, and that the brakeman had one foot upon the forward rail of one car and the other foot upon the rear rail of the other car, stretched across. That seems to be the fact that the plaintiff's testimony tends to establish. The court must also assume that while in the discharge of that duty, so situated, he accidentally slipped, fell, and injured the plaintiff. The declaration is founded on the careless and negligent manner in which the brakeman discharged his duty, and the only two questions in the case to be determined upon this motion are — *First*, whether the company failed to discharge the duty which it owed to the plaintiff as a passenger; and, *second*, whether the brakeman was negligent in the discharge of the duty committed to his care. The defendant owed, as I have said, care and protection to the plaintiff, — such care and protection as, in the ordinary management and operation of trains, the highest degree of skill and care could exercise properly to protect her. I have carefully considered and reflected upon the evidence and upon the duty which this defendant owed, and the court is unable to see wherein the negligence of the defendant consisted. If the facts occurred as related by the brakeman, he was discharging his duty in the ordinary, usual, and customary mode, and his foot was pushed off by a passenger or some one from the interior of the car. If that were so, then he was simply the medium by which injury was inflicted upon the plaintiff through the act of some one else, and there would be no more liability upon the part of the company than if this passenger had rushed out upon the platform against the plaintiff, and thrown her down, in which case, I take it, there could be no question of liability on the part of the company. If, on the other hand, standing upon the two rails, as the plaintiff's witnesses have testified, he accidentally slipped and fell against the plaintiff, there is then no negligence proven either upon the part of the company or upon the part of the brakeman. It is one of those accidents that will happen. It is unusual, and of which every traveller assumes the risk when it has not been produced by the act of the company, or the omission of its duty, or by the negligent act of its agents. The court has been able to discover in this case no ground of legal liability upon the part of the defendant, and, however much it regrets the injury which the plaintiff has suffered, it could not discharge its duty under the law by permitting the case to go to the jury, because should there be a verdict for the plaintiff it would be the duty of the court to set it aside.

Plaintiff moved for leave to take a nonsuit, which was allowed.

GILBERT v. HOFFMAN.

SUPREME COURT OF IOWA, 1885.

[66 Ia. 205.]

REED, J.¹ . . . The evidence given on the trial shows that plaintiff arrived by train at the town in which the defendants' hotel was situated, at about three o'clock in the morning. She was met at the depot by her husband, who had been stopping for a number of days at the hotel, and she accompanied him to the house, and remained there as a guest until the evening of the next day, when the hotel was closed and "quarantined" by the authorities of the town; that is, the inmates of the house were not permitted to depart from it, except as they were removed to the pest-house when they were taken with the disease; and the public was excluded from it. When she went to the house, one of the guests was lying sick in a room in the house, and his disease proved to be the small-pox. He was examined by the physician the day before plaintiff arrived at the hotel, and there was evidence tending to prove that the physician then pronounced the disease small-pox, and informed defendants that that was its character. There is a conflict in the evidence, it is true, as to the time when defendants were informed as to the character of the disease with which this person was afflicted, but the jury were warranted in finding that the information was communicated to them on the day before plaintiff's arrival at the hotel. There was also evidence tending to prove that, in a conversation a few hours after her arrival, one of the defendants assured her husband in her presence that the disease was not in the house, and that the rumors that the person who was sick in the house had small-pox were circulated for the purpose of injuring the business of the hotel. While plaintiff's husband was at the depot awaiting her arrival, he was informed that a rumor was current that the disease was in the house, and he informed her of this before she went there.

Counsel for appellants contend that this evidence did not warrant the jury in finding for the plaintiff, because (1) it does not show that defendants were guilty of such negligence as renders them liable; and (2) that plaintiff, by going to the house after she was informed of the rumor which was current as to the presence of the disease, and without instituting an inquiry as to its truth, was guilty of such contributory negligence as precludes a recovery. But this position cannot be maintained. The jury, as we have seen, were warranted by the evidence in finding that defendants, with knowledge of the prevalence of the disease in the hotel, kept it open for business, and permitted plaintiff to become a guest, without informing her of the presence of the disease. That they would be liable to one who became their guest under these circumstances, and contracted the disease while in their house, and who

¹ Part of the opinion only is given. — Ed.

was himself guilty of no negligence contributing to the injury, there can be no doubt.

The district court properly left it to the jury to determine whether plaintiff was guilty of imprudence or negligence in going to the hotel after she heard the rumor that the disease was in the house, without inquiring further as to its truth; and they were told that, if the circumstances were such as that ordinary prudence and care demanded that she should, before going to the hotel, make further inquiry as to the truth of the rumor, and she neglected to do this, and this neglect contributed to the injury, she could not recover. The instruction states the rule on the subject quite as favorably to the defendants as they had the right to demand. By keeping their hotel open for business, they in effect represented to all travellers that it was a reasonably safe place at which to stop; and they are hardly in a position now to insist that one who accepted and acted on this representation, and was injured because of its untruth, shall be precluded from recovering against them for the injury, on the ground that she might by further inquiry have learned of its falsity. But the jury were warranted by the evidence in finding that she was not guilty of negligence in not inquiring further as to the truth of the rumor before going to the hotel. Her husband, who informed her of the rumor, had been stopping at the hotel for two or three days, and had heard nothing while about the house of the prevalence of the disease. The information as to the currency of the rumor was communicated to him at the depot while he was awaiting the arrival of the train. The jury might well have concluded that under the circumstances she was justified in assuming that the rumor was not of such importance as to demand further investigation. *Affirmed.*

McKEON v. CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY.

SUPREME COURT OF WISCONSIN, 1896.

[94 Wis. 477.]

CASSODAY, C. J.¹ This is an action to recover damages sustained by reason of the defendant's maltreatment of the plaintiff while riding on the defendant's passenger train, at and near New Lisbon, in this state, in respect to her changing cars at that place. . . .

1. Some of the errors are based on the theory that the complaint alleges a cause of action on contract, and not in tort. True, the complaint alleges, in effect, that there was implied in the contract of carriage that the defendant would awaken the plaintiff a sufficient length of time before reaching New Lisbon to enable her to dress herself and child, and otherwise prepare herself to be ready to leave the train safely and without haste or delay when the same should arrive at that place. It

¹ Part of the opinion only is given. — Ed.

also alleges, in effect, that, according to the rules and regulations of the defendant, and by common usage and practice, it was its duty to so awaken the plaintiff, and that the servants and employees of the defendant in charge of the sleeper agreed to so awaken her when she procured her berth, but that they "did not call nor awaken her before reaching New Lisbon, but neglected and failed so to do, without any reason therefor;" that the plaintiff was still sleeping when the train reached New Lisbon; that, upon reaching New Lisbon, the porter of the car drew the curtains in front of her berth apart, and informed the plaintiff, occupying the same, that the train had arrived at New Lisbon; that she must hurry and leave the train at once; that, upon her requesting him to hold the train for a few minutes, to enable her to dress herself, he refused so to do, and continued to urge her to leave the car at once; that, from the time she was awakened until the departure of the train from the station, the time was insufficient to permit the plaintiff to properly prepare herself and leave the train; that she at once arose from her berth, and the porter refused to allow her to put on her clothing, but pushed, hustled, and hurried her to the rear end of that car, to which the sleeper for Merrill was attached, and into which she was required by the porter to go; that the train on which she had so been traveling was started about the time she reached the door of the sleeper she was so leaving; that, by reason of the conduct of the porter, and the facts stated, and the starting of the train, she was at the time very much excited, and fell with great force against the framework or fixtures of the Merrill sleeper, on entering the same, on account of which she was seriously bruised and injured; that, at the time she was so ejected from the car, she had on but little clothing, and her person was exposed to a number of men, occupying the Merrill sleeper at the time she entered the same, and they saw her in that condition; that it was raining very hard at the time, and she was exposed to the same in leaving the train; that she was at the time thirty years of age, and in good health, but pregnant with child; that, by reason of the facts stated, she became very ill a few minutes after entering the Merrill sleeper, and had a miscarriage on the same day. From the whole complaint we think it was manifest that the cause of action alleged is for the maltreatment of the plaintiff,—and hence is in tort, and is not for a mere breach of contract. *Brown v. C., M. & St. P. R. Co.*, 54 Wis. 342; *Mueller v. Milwaukee St. R. Co.*, 86 Wis. 340.

2. It is contended that actionable negligence is not proved, and hence that a verdict should have been directed in favor of the defendant, or else the verdict should have been set aside and a new trial granted. It is enough to say, in answer to such contention, that the evidence in behalf of the plaintiff tends to prove the allegations of the complaint. It also appears that the findings of the jury are supported by the evidence. It was impossible for the defendant, with a train running to La Crosse, to carry the plaintiff to Merrill without her changing cars at New Lisbon. As the plaintiff held the defendant's sleeping-car ticket

to New Lisbon, she was necessarily expected to use it by occupying her berth until awakened for the purpose of making such change of cars. To make such change, it became the duty of the defendant, whether stipulated in the contract of carriage or not, to either awaken her in time to make the necessary preparation for such change in a suitable and decent manner, upon reaching the station, or, failing to so awaken her before reaching the station, to hold the train at that point for a sufficient length of time to enable her to make such preparation as was necessary to change cars without trepidation or the exposure of her person to the gaze of spectators. The neglect of the defendant to perform such duty, resulting in damage to the plaintiff, under the facts and circumstances stated and found, is sufficient to authorize a recovery, notwithstanding such duty is not expressly prescribed in the contract. These views are supported by numerous adjudications. A few only are cited: *Brown v. C. & St. P. R. Co.*, 54 Wis. 342; *Stutz v. C. & N. W. R. Co.*, 73 Wis. 147; *Dawson v. L. & N. R. Co.*, 11 Am. & Eng. R. Cas. 134; *Pullman Palace Car Co. v. Smith*, 13 L. R. A. 215, 79 Tex. 468; *Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191; *Fordyce v. Nix*, 58 Ark. 136; *Kentucky C. R. Co. v. Biddle* (Ky.), 34 S. W. Rep. 904. Counsel for the defendant cite *Nichols v. C. & W. M. R. Co.*, 90 Mich. 203, but it is not in point. In that case the plaintiff had no sleeping-car ticket. The court held that it was the duty of the conductor or brakeman to call out the station, but not to awaken the plaintiff. In that case the plaintiff, after having passed his station, jumped off at a branch track or crossing in the woods, where there were no inhabitants or station agent, and without the knowledge or expectation of any of the trainmen.

CONROY v. CHICAGO, ST. PAUL, MINNEAPOLIS AND
OMAHA RAILROAD.

SUPREME COURT OF WISCONSIN, 1897.

[96 Wis. 243.]

THIS action was brought for the recovery of damages sustained by the plaintiff while a passenger on its easterly bound train of cars from Ellsworth to Marshfield, Wisconsin, by reason of the alleged negligence of the defendant.

A part of the western bound freight train of the defendant, consisting of a car load of coke, three metal tanks, two of which were filled with naphtha, and one with kerosene oil, and the caboose in the rear, had been separated from the rest of the train, and had been wrecked early in the morning, and the said cars were on fire and in a dangerous condition on the defendant's track between said places, about three miles east of the station called Roberts, and west of Hammond. The defendant carried the plaintiff on its passenger train to Roberts, where

the fact that such wreck had occurred was made known to the plaintiff and other passengers. When the passenger train arrived within about 400 feet of the wreck, the passengers were directed to retain their places in the cars until such time as a train might arrive to carry them on their journey, and to which they would be transferred on the east side of the wreck. The forward tank, containing naphtha, exploded soon after the wreck, and everything in the rear of it, as well as the coke car in front, caught fire. This was quite a violent explosion, and portions of the tank were thrown a considerable distance, and the tank containing naphtha next to it was so broken as to permit much of the contents to run out. The kerosene tank in the rear was thus set on fire, and continued to burn from that time until nearly 11 o'clock, a considerable part of the time with great violence, and producing a loud, roaring noise, with flames shooting up. A wrecking train and car had arrived at about 8 o'clock in the morning, and were operating upon the wreck, and had hitched to the tank of kerosene oil, and attempted to draw it out, scatter the burning coke, and thus clear up the track. Attempts to remove it opened the seams in the tank, and it began to burn more violently.

The wreck occurred in a farming country, and the right of way was 100 feet wide, extending through cultivated fields on either side. A gap was opened in the right of way fence on the south side, 257 feet west of the tank, and another in the wire fence, running through the fields at right angles with the road, at a point ninety-five feet south of the right of way, but 147 feet from the burning tank, and the third gap was opened in the right of way fence 256 feet east of the burning tank, in order to transfer the baggage, express matter, and mails. Efforts were unavailing to keep the passengers in the cars. A large number of them had got out, and thereupon it was concluded to transfer them, through the gaps, around the wreck, to a point east of the east gap, where they were to take the other train, and they were transferred accordingly, as well as the baggage, mail, and express matter; the latter being deposited about opposite the east gap, and the passengers occupied, in groups, a considerable space east from the east gap, along the right of way, for a distance of over 100 feet. The plaintiff, with other passengers, walked around said wreck, through said gaps, to the place where the eastern gap was opened, and said mail matter, baggage, etc., had been deposited, to wait for a train to continue his journey.

The injury complained of occurred about an hour after the passenger train arrived at the scene of the wreck, and when the plaintiff had approached to, and was standing, about eighty-five feet east of the burning tank, or one third of the distance from said tank to where the east gap had been opened. The plaintiff was standing at said place for about half or three quarters of an hour before the explosion occurred; having left the eastern gap and walked westward towards the burning oil tank. At the time of the explosion the flame from the

burning tank ascended about 100 feet or more, and, as one witness said, there was nothing but fire in the sky. Just before the explosion the flames were burning quite high,—from three to five feet,—right in the middle of the tank, and kept rising and going down. The plaintiff received his injuries from the burning oil, cast on him by the explosion.

It was contended by the plaintiff that the defendant was guilty of negligence in not warning him of the danger to which he was exposed by said burning wreck, and in not providing a safe place, and in designating an unsafe one, for the plaintiff and other passengers to wait for the train designated to carry them eastward, and in not warning the plaintiff of the danger to which he was exposed at the place he was waiting, and in allowing him to leave said train and go to said place and there remain, and in allowing said train wreck to be and remain in a dangerous and unsafe condition. The defendant denied all allegations of negligence, and alleged and gave evidence tending to show that, by its officers and agents, it directed the plaintiff and other passengers to a place at the east gap, and eastward thereof, designated as a temporary station, to wait for the train to carry them eastward, which was a sufficient distance from the wreck to insure safety from any injury on account thereof, or the subsequent explosion. The plaintiff, in his complaint, alleged that the defendant directed the plaintiff to go around said wreck to a point east and south thereof, and he accordingly walked around the same to a point on defendant's right of way, designed by the defendant as a temporary station, to wait for said train to carry said passengers eastward.¹

PINNEY, J. The carrier owes to its passenger, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where he may await the arrival of trains, as well as the duty to seasonably warn him, when reasonably necessary, of any existing or apprehended danger which may interfere with or imperil his personal safety. The defendant contends it performed towards the plaintiff the full measure of its duty, and that the proximate, or at least a contributing, cause of the plaintiff's injury was his own negligence in unnecessarily exposing himself to danger. The point to which the plaintiff and his fellow passengers were directed to go by the defendant's agents, and to which he went as a temporary station, as thus directed, to wait for the train which was to convey him and his fellow passengers eastward to their respective destinations, was the gap opened about sixteen rods east of the burning wreck, and at and east of which the mail, express matter, and baggage had been deposited. The wreck and remaining naphtha and the kerosene oil in the oil tank were burning fiercely, and flames were shooting from the joints in the oil tank or car, and flashed up to the height of many feet, making at times a loud, roaring noise. The gaps opened in the right

¹ The special verdict, arguments of counsel, and a part of the opinion are omitted.—Ed.

of way fence, on the south side of the railway, by which a way had been opened around the burning wreck, diverged to the south, in order to avoid it. The details of the entire scene, about which there is no material dispute, were open and obvious, even to a casual observer, and gave clear and emphatic warning to the humblest intelligence of impending danger from the burning tank of oil. The situation spoke for itself, and in no uncertain tones. The plaintiff had nothing to do but to observe these facts as they appeared before him, and to consult his own safety. His actual transit as a passenger had been interrupted, and, until the train arrived from the east, he was free to go and come as he chose, and the company had no power to restrain him in the least.

1. Whether the company had performed its entire duty towards him, under the circumstances, or not, it was his duty to exercise ordinary care and caution to secure his own safety. The railway company was not an insurer of his personal safety, and it is familiar law that, under the circumstances stated, the duties of the plaintiff and of the defendant to observe proper care and caution are reciprocal. If the plaintiff failed to exercise ordinary care and caution, and by reason of such failure he sustained the injuries complained of, he was guilty of contributory negligence, and must be held to have assumed the consequent risk or danger of injury. Assumption of risk in such cases is a species of contributory negligence. *Darcey v. Farmers' L. Co.*, 87 Wis. 249; *Nadau v. White River L. Co.*, 76 Wis. 120, 131. The plaintiff was in the open country, and under no restraint. Whatever of danger there was in consequence of the alleged negligence of the defendant, he was free and able to avoid it. It is not a question of what he thought or believed would be safe and prudent, under the circumstances, for him to do. If he unnecessarily exposed himself to a danger, obvious to a person of ordinary care and prudence, and was injured in consequence, he cannot recover. He was an adult, and must be held bound to the exercise of the same care and prudence as a person of ordinary care, intelligence, and judgment. The defendant, on the other hand, had a right to assume that the plaintiff would act with reasonable care and caution, and occupy the position or situation to which he had been conducted; and we are unable to perceive anything in the case to warrant the inference that the defendant had any reason to apprehend that the plaintiff would expose himself to or incur unnecessary danger. The actual transit of the plaintiff in the defendant's passenger train having been interrupted, its duty required that it should exercise towards the plaintiff at the temporary station, as it is called, to which he had been directed, such reasonable and proper care as one of ordinary care and prudence would exercise under the circumstances. The plaintiff appears to have disregarded all the plain and obvious warnings of danger suggested by the facts and circumstances, and which could not have failed, it would seem, to arrest the attention of a person of ordinary intelligence, care, and prudence.

The special verdict finds that, if the plaintiff had remained at the place designated, "he would not have been seriously injured," but that he "unnecessarily, and from motives of curiosity and pleasure, went from there to a place much nearer the burning tank," as already indicated, and where he remained twenty minutes, and up to the time of the explosion from which he received his injuries; that "the plaintiff's injuries were *caused by reason of his so going nearer the burning tank.*" It is true that it is found that the defendant, its officers, etc., "in the exercise of ordinary prudence, should have known of the plaintiff's position in time to warn him of the *danger which threatened on account of the burning tank,*" and that in the exercise of reasonable care they ought "to have anticipated that the plaintiff would go nearer to the burning tank, and *thus incur unnecessary danger;*" and they found that the defendant gave the plaintiff warning with respect to the danger to which he was exposed by virtue of the presence of the burning tank, but that "it was insufficiently or negligently given." The jury acquitted the plaintiff "of any want of ordinary care that contributed to his injury," and found that he was "not guilty of any want of ordinary care, however slight, in so going much nearer the burning oil tank," and that "a reasonably prudent man, under the circumstances, situate as the plaintiff was, with his means of knowledge, would not have anticipated that there was danger of an explosion of the burning oil tank." The verdict finds that the defendant's officers, etc., "by the exercise of ordinary care and prudence, would have anticipated that an explosion might occur," and "did not exercise reasonable care and prudence in designating a safe place where the plaintiff and other passengers were to take the train which was to carry them east;" and that, through its officers, etc., it was "guilty of negligence, which was the proximate cause of the plaintiff's injuries."

The verdict is inconsistent and contradictory on vital points, and no judgment should have been entered on it. It was the duty of the defendant to give proper and sufficient warning of actual or apprehended danger; but the evidence tends to show quite clearly that the plaintiff had ample notice, from the situation and circumstances, of the danger to be apprehended from the burning wreck and tank of kerosene. A considerable number of witnesses on the part of the defendant gave evidence tending to show that its agents and servants gave reasonable warning of danger, and indicated where the passengers were to remain; but the plaintiff denied that he heard anything of the kind, and so did two others who testified in his behalf. Aside from this, there was little or no material dispute as to the facts. The question is as to the proper inferences to be drawn from them. The highly inflammable and dangerous character of kerosene is a matter of common knowledge. Its irregular and rapid combustion from a lamp in an ordinary room justly conveys alarm and an immediate sense of danger. Here was an entire tank or car of it, upon a burning wreck, and in a highly heated condition, and flames escaping from

joints in the tank. It was liable at any time to explode with great violence and serious injury. It would seem that no notice that could be given would convey more clearly a sense of impending danger than the actual situation, open and obvious to any one who would make a reasonable use of his senses.

2. The plaintiff cannot recover for injuries caused by the defendant's negligence if he himself failed to exercise proper care and his own negligence contributed to the result. In *Hickey v. B. & L. R. Co.*, 14 Allen, 429, the rule we think applicable to the case is stated: That if an injury has happened while a party is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care on his part; but when the evidence shows that he left the place assigned for passengers, and was occupying an exposed position, and "that the injury was due in part to the fact of such position, he must necessarily fail, unless he can also make it appear that by some ground of necessity or propriety his being in that position was consistent with the exercise of proper care or caution on his part." All the adjudged cases agree that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence which substantially contributes to the result. *Railroad Co. v. Houston*, 95 U. S. 697-702; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 313; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248, 252. A passenger is not justified in incurring risks unnecessarily, however rare the chances may be that he will suffer by it (*Todd v. O. C. & F. R. R. Co.*, 3 Allen, 18); and, "if passengers voluntarily take exposed positions, with no occasion therefor caused by the managers of the road, except a bare license by non-interference or passive permission of the conductor, they take the special risks of that position on themselves." *Sweeny v. O. C. & N. R. Co.*, 10 Allen, 368; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318-327; *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609, 612, 613. The plaintiff in this case voluntarily, and out of mere curiosity and for his own pleasure, took an exposed position, not intended or pointed out for passengers, and he cannot hold the defendant liable for injuries to which such act contributed. *Torrey v. B. & A. R. Co.*, 147 Mass. 412, 413. The defendant and its agents were not bound, under the circumstances of this case, to restrain the plaintiff by physical force in order to keep him out of manifest danger, which was as obvious to him as to them. It was not negligence on their part that they did not restrain him by physical force from unnecessarily exposing himself to danger from the burning tank of oil. *Penn. R. Co. v. Zebe*, 33 Pa. St. 327; *Hickey v. B. & L. R. Co.*, 14 Allen, 433.

3. The relation of carrier and passenger we think existed between the plaintiff and defendant at the time of his injury, although his actual transit as such had been interrupted for the time being, and he had been directed, and had proceeded, to a place on the defendant's premises, to await the arrival of another train upon which to complete

his journey. He had not abandoned his right to complete it in the defendant's cars. He had merely taken up, it is claimed, an exposed and dangerous position with reference to the burning tank of oil on the defendant's right of way, which may, perhaps, disentitle him to recover on account of the injuries he received.

4. The defendant did nothing, either expressly or by implication, to invite, entice, or allure the plaintiff to the position of danger he appears to have voluntarily and unnecessarily assumed. Neither the impending danger, nor its cause, was concealed. He was not a child of immature years, but an adult, and, as we must assume, of reasonable intelligence, judgment, and prudence. With a full knowledge of the facts, or the means of knowledge before him, he took this position of danger, and kept it for twenty minutes before the explosion, watching the tank and its surroundings, to gratify his curiosity. The case does not come within the rule of *Bennett v. Railroad Co.*, 102 U. S. 577, and cases there cited. Here there was no pitfall or trap, nor had there been any invitation to the plaintiff, express or implied, to occupy the position he did. He was still under obligation to use reasonable care on his part for his own safety. Nor is the case, for the reason stated, governed by the principles upon which the cases of *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. M. & St. P. R. Co.*, 21 Minn. 207-211; and *Union P. R. Co. v. McDonald*, 152 U. S. 262, much relied on by the plaintiff, were decided.

JACOBS v. WEST END STREET RAILWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1901.

[178 Mass. 116.]

LORING, J.¹ This is an exceedingly close case. On the one hand as street cars are run, it is not negligent to take on passengers when all the seats are occupied, when there is no more standing room in the passageway of the car and the new passengers have to stand on the platforms and even on the steps; *Meesel v. Lynn & Boston Railroad*, 8 Allen, 234; furthermore a passenger takes the risks incident to the mode of travel he chooses to adopt, as for example the risk of being injured in the removal of an objectionable passenger from a crowded car. *Spade v. Lynn & Boston Railroad*, 172 Mass. 488. On the other hand it has been held that a street railway company may be held liable for negligence if it allows its car to be so crowded with passengers that one of them is crowded off a platform while the car is proceeding on its way. *Lehr v. Steinway & Hunters Point Railroad*, 118 N. Y. 556; *Reem v. St. Paul City Railway*, 77 Minn. 503; *Pray v. Omaha Street Railway*, 44 Neb. 167. It has also been held that the duty which a street railway owes to its passengers is not terminated until the pas-

¹ Part of the opinion only is given. — Ed.

senger has alighted from the car, and covers the time during which the passenger is getting off; and lastly it may be that if an aged woman passenger is pushed off the step by the turbulent behavior of the crowd behind her while she is alighting from the front platform under the very eyes of the motorman, there is evidence of negligence for the jury; *Hansen v. North Jersey Street Railway*, 35 Vroom, 686; and so also when the passenger is jostled by incoming passengers, as in *Buck v. Manhattan Railway*, 15 Daly, 48; S. C. 276, 550. See in this connection *Treat v. Boston & Lowell Railroad*, 131 Mass. 371, 373, where the presence of an excessive crowd on a train on a steam railroad is considered in a case where the train never came to a full stop at the station at which the plaintiff had a right to get off.

In the case at bar there was no evidence that the injury which the plaintiff in the first case suffered was caused by any defect in the platform, but it appeared that it was caused by the plaintiff's tripping over "something" while she was on the rear platform on her way to the street. There was evidence that the crowd on the platform made it "impossible for the plaintiff to get at and use the iron rail at the rear of the car," to steady herself as she was getting off; and it appeared "that the conductor was inside of the car," "in the middle of the car" while the plaintiff was alighting.

It may be conceded in this case that it is the duty of a conductor who is on the rear platform when a passenger is alighting to see to it that the passenger has an opportunity to alight with safety, and that it is his duty to see to it that passengers who are blocking the exit shall stand aside or even alight from the car temporarily; passengers who choose to take passage on a car which is so crowded that they have to stand on the rear platform or on the steps and who thereby block the exit from the car, assume all inconveniences incident thereto, including that of temporarily alighting, when necessary, to allow a proper exit for passengers who wish to get off. It also may be conceded that the conductor's duty requires him when not otherwise engaged to be on the rear platform. But a conductor has duties to perform which take him away from the rear platform, and the greater the number of passengers the longer the time during which it is necessary for him to be absent and properly absent from it. The duty of collecting tickets, for example, being one which cannot always be postponed, is a duty which in a crowded car requires the conductor to be absent from the platform a good deal and for some length of time, and if a passenger wishes to alight while the conductor is so engaged, the inconvenience which she may endure in having to alight without his aid is one of those inconveniences which the passenger assumes by choosing to travel on a street car at a time of day when it is notorious that such conveyances are crowded.

There is no evidence in the case at bar that this conductor was negligent in being absent from the rear platform when the plaintiff was alighting. Unless the plaintiff is entitled to go to the jury on the

ground that the company should provide some one in addition to the conductor and motorman to care for the car and its passengers, there was no evidence of negligence in this case. As street cars are run we do not think that the omission to employ a third person could be found to be negligence.

The fact that the place where the plaintiff was getting off is a place where passengers are transferred to other lines makes no difference; no distinction can be drawn between the duties devolving upon a street railway company when stopping at such a place for passengers to alight and those which they have when they stop at other places. Neither does the fact that the plaintiff weighed over two hundred pounds make a difference; the mere fact that a woman weighs over two hundred pounds cannot make it the duty of the conductor to drop all other duties and help her get off.

Neither is it material that there was evidence that there were passengers "trying to get on, as the passengers were alighting from the car" and "that there 'was a scuffle, a regular scuffle.'" There was no evidence that the plaintiff was jostled by anybody; it appeared that the injury was caused by her tripping over something.

For these reasons we are of opinion that there was no evidence on which the jury could find that the defendant was negligent.

LEVINS *v.* NEW YORK, NEW HAVEN AND HARTFORD RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1903.

[183 *Mass.* 175.]

HAMMOND, J. The evidence is conclusive that the money lost was not intended to be used for travelling expenses, but for an entirely different purpose. The plaintiff was upon the train, going to her home in the city of New York. She had a pass and a special ticket, upon both of which she relied to get there. She testified that the money had been obtained by a recent sale of certain property in New York, belonging to her mother, that her mother had consented that she might use it in the purchase of an interest in the business of one Snyder in New York, and that it was "not at all" for travelling expenses, but that she intended to use it for the purpose of going into business. The money therefore was not baggage within the legal meaning of that term as used in this connection; and as to it the common law liability of a common carrier was not upon the defendant. *Jordan v. Fall River Railroad*, 5 Cush. 69; *Dunlap v. International Steamboat Co.*, 98 Mass. 371, and cases cited. Nor was the money intrusted to the defendant. It was kept within the exclusive control of the plaintiff. The defendant was not even a gratuitous bailee. In a word, the money was not baggage, nor was it under the care or in the pos-

session of the defendant. Neither as a common carrier, nor as a bailee did the defendant assume any care whatever over it, nor with respect to it did it as such owe any legal duty to the plaintiff. The contract between the plaintiff and the defendant did not cover the money, and the legal relation of the defendant to it after the contract was no other than before. In this respect the case is clearly distinguishable, on the one hand, from that numerous class of cases in which the article lost was baggage within the meaning of the term as used in this connection, in which cases the common law liability exists, and, on the other hand, from the class of cases, perhaps equally numerous, where the property is delivered into the possession of the carrier, in which cases a liability arises from the bailment. If, therefore, the money had been stolen by any person other than the defendant or some one of its agents or servants, it could not have been said that the loss was in any way attributable to a failure of duty on the part of the defendant.

It is contended however by the plaintiff that the jury would have been justified in finding that the money was stolen by the porter, one of the servants of the company; and she insists that in such a case the defendant would be liable. Assuming in her favor, for the purposes of the discussion, that the jury might properly have found that the porter stole it, we do not think that the defendant could have been held liable for the act. It is true that, where there is a duty to be performed by the carrier with reference to the person or property of a passenger and there has been a failure to perform it, the fact that the failure arose from a positive act of a servant to whom the carrier had delegated the performance of the duty is no defence. A familiar instance is where a passenger is wilfully assaulted by a servant to whom the carrier has delegated the duty of using proper care to prevent such an assault. Such a case differs from that where the assault is committed by a servant acting within the scope of his employment, as in *Moore v. Fitchburg Railroad*, 4 Gray, 465; and the carrier is held, not upon the ground that the assault was committed by his authority, but upon the ground that he failed to exercise his duty to protect the passenger; and hence the declaration in such a case is not for an assault, but for a failure to prevent one. *Bryant v. Rich*, 106 Mass. 180. Such being the ground of liability, it can make no difference by whom the assault was committed, provided there be negligence shown in the performance of the duty respecting the protection of the passenger.

The plaintiff has failed to show any legal duty resting upon the defendant as to the care of this money lying upon the window sill where the plaintiff placed it. It was not within the scope of the employment of the porter to make any new contract, or to modify one already made. He had a very limited duty as to the performance of contracts already made and the duties of the defendant arising therefrom, and there his power to represent the defendant

stopped. If he stole the money, he and not the defendant was the thief, and the act was not the result of any failure of the defendant to discharge its duty. There is no ground upon which the defendant can be held. For similar cases in other jurisdictions see *Illinois Central Railroad v. Handy*, 63 Miss. 609; *Root v. New York Central Sleeping Car Co.*, 28 Mo. App. 199.

The conclusion to which we have come upon this ground of the defence renders it unnecessary to consider the others, some of which seem quite formidable, upon which the defendant relies.

Exceptions overruled.

CLANCY v. BARKER.

SUPREME COURT OF NEBRASKA, 1904.

[71 Neb. 83.]

ALBERT, C.¹ . . . The evidence adduced by the plaintiff sufficiently shows that the plaintiff, his wife and infant son became guests at the hotel, intending to remain but a short time; that about three days after they were received in the hotel, and while they were guests therein, a servant of the proprietors of the hotel, who had waited upon the plaintiff and the members of his family during their stay at the hotel, was playing a harmonica in a room which was not one of those assigned to the plaintiff or any member of his family; that the plaintiff's infant son, attracted by the music, entered the room, the door of which was open; that thereupon the servant who had been playing the harmonica took up a revolver and pointed it at the boy, saying, "See here, young fellow, if you touch anything, this is what you get." The revolver, by some means, was then discharged, the ball striking the boy, destroying one of his eyes and inflicting upon him other serious injuries. While there is no direct evidence that the person who inflicted the injuries was in the employ of the proprietors of the hotel, the evidence shows that he waited on the guests, carried water to their rooms and rendered such other services as are usually rendered by servants of a certain class about a hotel, and is amply sufficient to warrant a finding that he was the servant of the proprietors, and, for the purposes of this case, would have made him such, perhaps, in the absence of a contract of employment. There is no evidence tending to connect the defendant George E. Barker with the operation of the hotel.

At the close of plaintiff's case the court directed a verdict for the defendants, and from a judgment rendered on such verdict the plaintiff brings the record here for review.

The defendants insist, that the plaintiff having failed to allege that the servant wilfully or maliciously inflicted the injury, it was incumbent

¹ Part of the Commissioner's opinion and the dissenting opinion on rehearing are omitted.—ED.

on him to show that the injuries were the result of negligence on the part of the servant in the performance of some duty for which he was employed, or in the discharge of some duty which the defendant owed the plaintiff. We think they overlook the theory upon which this action was brought and prosecuted. The plaintiff by his petition and evidence obviously intended to commit himself unreservedly to the theory that his cause of action is *ex contractu*. A contract is alleged in the petition, the wrongful acts of the servant, which resulted in injury to the boy are alleged, not for the purpose of stating a cause of action *ex delicto*, but for the purpose of showing a breach of contract and consequent damages.

This brings us at once to the question, whether the act of the servant, resulting in the injuries complained of, constitutes a breach of the implied contract between the plaintiff and the proprietors of the hotel for the entertainment of the former and his family. By the implied contract between a hotel keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is implied on his part the further undertaking that the guest shall be treated with due consideration for his safety and comfort. *Rommel v. Schambacher*, 120 Pa. St. 579; *Jencks v. Coleman*, 2 Sumner (U. S. C. C.), 221. In *Commonwealth v. Power*, 7 Met. (Mass.) 596, Shaw, C. J., said:

“An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order.”

The foregoing language is quoted with approval in *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450. Substantially the same language is employed by the court in *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506. See also *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557, 585; *Russell v. Fagan*, 7 Houst. (Del.) 389; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239. The foregoing also show that the duties of a hotel keeper to his guests are regarded as similar to the common law obligation of a common carrier to his passengers. As regards the duty of a common carrier to his passengers, in *Dwinelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117, 127, the court said:

“As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and, during its performance, to care for his comfort and safety. The duty of protecting the personal safety of the passenger and promoting, by every reasonable means, the accomplishment of his journey is continuous, and embraces other attentions and services than the occasional service required in giving the passen-

ger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveller, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it."

To the same effect are the following: *Pittsburg, F. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Chamberlain v. Chandler*, 3 Mason (U. S. C. C.), 242; *Pendleton v. Kinsley*, 3 Cliff (U. S. C. C.), 417; *Bryant v. Rich*, 106 Mass. 180; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398. An examination of the foregoing cases will show, we think, that the reasoning applies with equal force to a hotel keeper as regards his duties to his guests. Those duties spring from the implied terms of his contract and a failure to discharge them, and while it may in some instances amount to a tort, it amounts in every instance to a breach of contract.

If then the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule which requires that a guest at a hotel be treated with due consideration for his comfort and safety would be of little value if limited to the proprietor himself. As a rule he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as guests; and if they be not thus treated there is a breach of the implied contract, whether the lack of such treatment is the result of some act or omission of the proprietor himself, or of his servant or servants.

Neither do we deem it material whether the servant, at the time of the injury, was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor and an inmate of the hotel; his duty as to the treatment to be accorded the guests of the hotel was a continuing one and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty. The following from *Dwinelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117, is peculiarly applicable to this point:

"The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is

little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it, when the blow was struck. The blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

It is equally immaterial to this case, we think, whether the shooting was accidental or wilful. The servant in pointing a loaded gun at the boy committed a trespass, and as a result of such trespass inflicted serious and permanent injuries on the child. His acts, therefore, constituted a breach of the implied undertaking of his employers to treat the plaintiff and his family with due consideration for their safety and comfort, for which breach his employers are liable in damages.

We are aware that there are cases holding contrary to the foregoing conclusion, but they do not seem to us to be based on sound reasons, nor upon just considerations of public policy, and are contrary to the weight and trend of modern authority.

The plaintiff offered to prove by one of his witnesses that the day following the accident one Mr. Bowman, the manager of the hotel, told the witness "that he had told the boys (referring to the porters and bellboys of the hotel) time and again to keep the kid (meaning the plaintiff's son) out of the elevator, halls and rooms of the hotel, and to keep him in his mother's room." The offer was rejected, and the plaintiff contends that the ruling of the court in that behalf is erroneous. We do not think so. It was not within the scope of the authority of the manager to bind his employer by the admission or declaration sought to be proved, and it was too remote in point of time and too detached from the injury to be admissible as a part of the *res gestæ*. *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103; *Commercial Nat. Bank v. Brill*, 37 Neb. 626; *Collins v. State*, 46 Neb. 37; *City of Friend v. Burleigh*, 53 Neb. 674.

As to the defendant George E. Barker, as we have seen, there is no evidence which would warrant a verdict against him. Hence, so far as he is concerned, the judgment of the district court is right, but as to the other defendants it is recommended that the judgment be reversed and the cause remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court, as to the defendant George E. Barker, is affirmed and, as to the other defendants, the judgment is reversed and the cause remanded for further proceedings according to law.

REHEARING WAS GRANTED.

SEDGWICK, J. Since the filing of the former opinion in this case, the question principally discussed therein, and arising out of the same transaction, has been decided by the United States court of appeals for this circuit, *Clancy v. Barker*, 131 Fed. 161. The opinion of that court prepared by Judge Sanborn strongly states the reasons which led the majority of the court to the conclusion that the hotel company ought not to be held liable. In a dissenting opinion Judge Thayer upholds the views expressed in the former opinion of this court.

1. The first ground urged by counsel for holding the defendant liable we think is satisfactorily discussed in the majority opinion of that court. This relates to the doctrine of *respondeat superior* derived from the relation of master and servant. If there had been evidence showing that it was the duty of the employees of the hotel to prevent children from entering and playing in rooms which were not assigned to them, it might perhaps be contended that the boy Lacy was acting within the scope of his employment when the accident occurred. The evidence offered as tending to show that he was so acting was properly excluded, as shown in the former opinion, and it does not appear that there was any other evidence in the record upon this point.

2. Whether the relation that exists between a keeper of a hotel and his guests makes the former liable for any misconduct of his employees, by which his guests are injured while they are in the hotel and are in his care, is a more difficult question. It is admitted that common carriers under such circumstances are liable. It is said that the reason for this is that the passenger places himself in the care of the employees of the carrier, and is continually in their care, so that whatever they do while the passenger is being transported is within the scope of their employment. The hotel keeper is also bound to bestow reasonable care for the safety and comfort of his guests. He is not an insurer of his guests; but neither is the carrier an insurer of his passengers. The carrier of course is bound to use extraordinary care or, as is sometimes said, the utmost care for the safety of his passengers. The business engaged in is a dangerous one and the care should be in proportion to the danger that exists. In this respect there is a difference between the two situations, but both perform public duties, and are bound to serve any individual who requires their service and suitably applies for it. The hotel keeper offers accommodations for strangers who are not acquainted with his employees and who have no voice in their selection. He undertakes to provide them with suitable accommodations and with at least a certain degree of care for their comfort and safety. He has some control over their persons and conduct. He must not allow such conduct on their part as will interfere with the reasonable hospitality which he owes to other guests. It may be that the carrier has greater control over the persons and conduct of passengers, but this idea seems to be exaggerated in some of the opinions. In what sense does the porter of a sleeping car have charge of the occupants of the car and have control of their conduct

and behavior? Surely, if it is different in degree from the control that the hotel keeper has over his guests, it is not much different in kind. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so; and is under obligation to select such employees as will look after the safety and comfort of his guests, and will not commit acts of violence against them so far as is reasonably within his power. It would seem that to relieve him from liability for injuries done to his guests by his employee, upon the sole ground that the employee was not then in the active discharge of some specific duty in connection with his employment, and hold the carrier responsible under similar conditions, is making a fine distinction. The liability of a common carrier under such circumstances is a doctrine of modern growth. There does not appear to be reason for establishing such doctrine that would not equally apply under modern conditions to the relations between an innkeeper and his guests.

Notwithstanding the great respect due to the court which has reached a contrary conclusion in *Clancy v. Barker*, *supra*, we conclude that our former decision ought to be adhered to.

FORMER JUDGMENT ADHERED TO.¹

BARNES, J., dissenting.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY v. RAINE.

COURT OF APPEALS OF KENTUCKY, 1908.

[113 S. W. 495.]

HOBSON, J.² Mrs. Minnie Raine lived in Atlanta, Ga. Her father lived at Harrodsburg, Ky., and she made trips about three times a year from her home to her father's. In January, 1906, she was at her father's and desired to go home on Sunday, January 7th. That morning her father called up the station agent of the Southern Railway in Kentucky at Harrodsburg by telephone, and told him that he wanted a reservation for his daughter in the sleeper for Atlanta on the train that night. The agent said he would wire Louisville and get it. That afternoon he called up the station agent, and was told by some one at the station that the reservation had been secured. The train from Louisville reached Harrodsburg about 10.35 p. m. Mrs. Raine bought a through railroad ticket to Atlanta, and with this got on the train at the day coach. She passed back, walking through two sleepers, where she found the sleeping car conductor. She asked him for the Atlanta sleeper, saying that she had a reservation in there. He told her there was no Atlanta sleeper on the train, but that there would be an Atlanta sleeper which would come from Cincinnati on the train which they

¹ See *Rommel v. Schambacher*, 120 Pa. 579; *Curtis v. Dinneen*, 4 Dak. 245. — ED.

² Part of the opinion only is given. — ED.

would meet at Danville. Danville is 10 miles from Harrodsburg. The Southern train runs from Louisville to Danville, and there connects with the train running from Cincinnati to Atlanta. While she was talking to the Pullman conductor, the passenger conductor also came in. They told her there was a Chattanooga sleeper on that train, and she could go into it and get a reservation at once, advising her to do so as the other train was frequently late, and she might have to sit up some time if she waited for the Atlanta sleeper. She had her little boy, about six years old, with her, and, when she learned that she would have to get up about 6 o'clock in the morning if she did this, she decided not to take the Chattanooga sleeper. They then advised her to sit in the Chattanooga sleeper until she got to Danville, telling her that, when they reached Danville, that sleeper would be put next to the Atlanta sleeper and she would only have to walk from one car to the other, while the Knoxville sleeper, in which she was then, would be put at some distance from the Chattanooga sleeper. She said that she would stay in the Knoxville sleeper with some friends, and they agreed for her to do so. When they reached Danville, the train from Cincinnati was forty minutes late. When she saw it come in, she went to the Pullman conductor, and asked him if he would not go and get her reservation for her. He answered that he was not allowed to leave his sleeper while it was standing at the station; that, as soon as they were out of Danville, he would see about it; that there would be plenty of time. When her car was attached to the other train, she again made the same request of him, and he made in effect the same answer. When the train pulled out of Danville, she and the Pullman conductor went forward and learned there was no Atlanta sleeper on that train; that the Cincinnati train had on that night been divided into two sections, the Atlanta sleeper being in the first section, and the Knoxville sleeper, in which she had been sitting, having been put in the second section. The first section was 10 miles ahead of them. She then said to the Pullman conductor: "Now, see what you have done by not attending to my reservation in Danville." He said: "Madam, I am not to blame. My clothes are on that section too." The train had only been running to Danville a month, and this Pullman conductor had never known the Cincinnati train before to run in two sections, although it happened from time to time when travel was heavy. The Chattanooga sleeper had been put in the first section, and if Mrs. Raine had taken a seat in that sleeper, instead of staying with her friends, there would have been no trouble. The section which she was in went to Knoxville. . . .

When Mrs. Raine came upon the sleeper, she had nothing but a railroad ticket. She had no sleeping car ticket, and she had nothing to show that she had any reservation in any sleeper. She remained in the Knoxville sleeper entirely by the courtesy of the conductor. She paid nothing for her seat in that sleeper, and it is evident that he allowed her to remain because she had her little boy with her, and she

decided to stay there and talk to her friends until she got to Danville. When the servants of a carrier know that a passenger is in the wrong car and that he must go into another car, they may simply tell him what to do, and ordinarily leave him to follow their directions; but, when they tell him to keep his seat, and that they will at the proper time transfer him to the other car, and fail to do so, the company which they represent is liable. Mrs. Raine was not a passenger of the Pullman Car Company, for she had not been received as a passenger. She had simply been allowed to sit in the sleeper with her friends, and the Pullman Car Company is not answerable to her because its conductor failed to get her in the right car; for he did not represent the company as to the Atlanta sleeper and she had made no contract with the Pullman Car Company, and it owed her no duty. But, while this is so, the Pullman conductor in dealing with Mrs. Raine, who had a railroad ticket, was discharging a duty which the railroad company owed her. The train conductor was with him, and assented to what the Pullman conductor said. In undertaking to transfer Mrs. Raine at Danville to the proper sleeper, and in telling her that she might remain in the Knoxville sleeper until he so transferred her, the Pullman conductor was discharging a duty which devolved upon the Southern Railroad Company. While he might have told Mrs. Raine what to do and left her to follow his directions, a very different state of case is presented when he told her that he would transfer her to the other sleeper, and for her to sit where she was, that there was plenty of time, and he would attend to it. The passenger conductor was present when the arrangement was made, and he left her in the care of the Pullman conductor. It was incumbent on these men under the circumstances to see that the lady was transferred to the proper train. The servants of a carrier cannot mislead a passenger, to his prejudice. It is proper that a passenger should obey the instructions which he receives from them; and when they tell a passenger to keep his seat, and they will at the proper time transfer him, he has the right to trust implicitly their directions. If Mrs. Raine had not been told to keep her seat, that there was plenty of time, she might have protected herself from the consequences that followed.¹

¹ See Ill. Cent. R. R. *v.* Harper, 83 Miss. 560.—Ed.

MIDDLETON v. WHITRIDGE.

COURT OF APPEALS, NEW YORK, 1915.

[213 N. Y. 499.]

MILLER, J. . . .¹ The plaintiff's intestate died from a cerebral hemorrhage occurring while he was riding as a passenger on one of the defendant's surface street cars. The question is whether there was any evidence from which a jury could have found that the proximate cause of death was the violation of some duty which the defendant owed him. The facts are admitted by the answer or established by uncontradicted evidence, though it is possible to draw conflicting inferences from them. At about 2.40 or 2.45 P. M. on May 24th, 1910, the deceased boarded a north-bound open "pay-as-you-enter" car at One Hundred and Fortieth Street in the borough of Manhattan. When last seen shortly before that he was apparently in good health. There was nothing in his appearance or manner to attract notice when he entered the car, and the conductor did not notice any one board the car who appeared to be sick or intoxicated. The answer admits that the attention of the conductor was called to the fact that there was something wrong with the deceased at or near One Hundred and Eighty-second Street and Amsterdam Avenue, and that upon entering the car the conductor found vomit upon his clothing, and permitted him to remain in the car in that condition until the end of the run was reached. The conductor testified that he observed the deceased change from the right to the left-hand side of the car at One Hundred and Eighty-fifth Street and Amsterdam Avenue, but did not notice vomit on his clothing and paid no further attention to him until the car reached the end of its run at Fort George, One Hundred and Ninety-fifth Street; that there he "tried to rouse" the deceased, "tapped him on his shoulder and told him it was the end of the road, and we were going back down town. He said 'All right, all right,' and he was starting to vomit;" that the deceased did not attempt to get up, but sat "right there in his seat;" that before starting back he (the conductor) told the starter that he had a "drunk" whom he "could n't get off;" that the starter, without entering the car or investigating the condition of the deceased, said "to let him sleep it off and carry him down; that he would be all right at the end of the trip." No further attention was paid to the deceased, but he was taken from Fort George to the post office. The conductor called no one's attention to the deceased at the post office, although there were starters and inspectors at that point, but started the car back up town. . . . When the car reached Sixty-fifth Street at 5.35

¹ Part of the case, involving questions of procedure, is omitted. — ED.

p. m. it was turned over to another crew, and with the deceased still on it was taken back to Fort George and again back to One Hundred and Twenty-fifth Street, when the attention of an inspector being called to the situation, the car was ordered back to the car barn at One Hundred and Twenty-ninth Street, a police officer was called, and at 7.45 p. m. the deceased was removed and taken to the police station. He was then in a state of complete coma. By the direction of the lieutenant he was taken to the Harlem Hospital, where his trouble was diagnosed as cerebral hemorrhage. The next day he was removed to another hospital, where he died at 11.45 p. m. without having regained consciousness.

It will be useful to determine at this point precisely what duty the defendant owed the deceased. If a passenger becomes sick and unable to care for himself during his journey, it seems plain that the carrier owes him an added duty resulting from the change of situation. That duty springs from the contract to carry safely. Of course, the carrier is not bound, unless it has notice of the fact, to observe that its passenger is ill, but if the defendant's servants knew, or had notice of facts requiring them in the exercise of reasonable prudence to know, that the deceased was sick and in need of attention, it was their duty to give him such reasonable attention as the circumstances and their obligations to other passengers permitted, and if they knew, or under the rule stated should have known, that he was too ill to remain on the car with safety, it was their duty, if practicable, to remove him and put him in the custody of an officer or some one who could look after him. Whilst no case precisely like this has been found, the general obligation of the carrier in such cases has many times been recognized. (See *Sheridan v. Brooklyn City & Newtown R. R. Co.*, 36 N. Y. 39; *Wells v. New York Central & Hudson River R. R. Co.*, 25 App. Div. 365; *Newark & South Orange R. R. Co. v. McCann*, 58 N. J. Law, 642; *Railway Company v. Salzman*, 52 Ohio State, 558; *Conolly v. C. C. Railroad Co.*, 41 La. Ann. 57; *Hutchinson on Carriers* [3d edition], section 992.)

It was of course practicable to stop the car at almost any point of its route and without undue delay to put the deceased in the custody of a police officer. The conductor knew that his passenger had boarded the car without exhibiting, so far as he observed, the slightest evidence of sickness or intoxication, that thereafter he had become suddenly ill, and that at Fort George, after having been carried by his destination, his illness had so progressed as to make him apparently unconscious of his situation and practically helpless. Of course, I am drawing the most favorable inferences to the plaintiff which the evidence and the admitted facts justify.

Was the conductor's heedlessness of his passenger's condition excused by the fact that he assumed, honestly but without any investigation, that the passenger was drunk? If a rash assumption on the part of the

conductor will excuse the discharge of the duty which the carrier owes to a passenger taken suddenly ill, then it might as well be said that no duty exists to render any assistance in such case. The case turns not on what the conductor assumed or thought, but on what he should in the exercise of reasonable prudence have done in the light of the facts which were brought to his notice. Of course, the defendant is not to be charged with neglect of duty because of the conductor's failure to discover that his passenger had a stroke of apoplexy. The fault of the conductor was not in making a wrong diagnosis, but in rashly assuming that he was competent to make any diagnosis at all. The passenger's nausea might have resulted from a variety of causes other than intoxication, and his apparent helplessness by the time the car reached Fort George indicated a critical condition requiring immediate attention. It may be assumed that at the moment of first noticing his passenger's nausea the conductor might reasonably have assumed that it was due to intoxication, although that assumption was opposed by the fact that the passenger had exhibited no evidence of intoxication upon boarding the car. The question is whether his continued heedlessness was justified by that assumption in view of what followed and had preceded. If a conductor is to be permitted to diagnose the condition of a passenger apparently taken suddenly ill and rendered helpless, he should at least in making the diagnosis exercise the judgment of a reasonably prudent conductor under the circumstances. There is no pretense that there was the slightest odor of liquor about the deceased, and it affirmatively appears that he had not been drinking. If he had drunk enough liquor to cause him to be in the condition described, it would seem that the odor of it could have been detected upon the most casual investigation. A jury could have found that the condition of the deceased grew worse, and from the description given by the conductor of what occurred at the post office that he was then utterly helpless. That condition, after he had ridden in an open car for two hours, vomiting every few blocks, was so extraordinary, if due to intoxication, as to justify a jury in finding that it would have occurred to a conductor, not utterly heedless, that the passenger was seriously ill, especially in view of the fact that he was apparently sober when he boarded the car.

It is of little consequence what other passengers thought, who owed the deceased no duty and only casually observed his condition. What occurred after the car started back up town from the post office is mainly important as bearing on his apparent condition before that and on the proximate cause of his death, because it is speculative at the best whether any attention rendered after that time could have saved his life. My conclusion is that a jury could have found from the evidence that at some point before the car reached the post office on its trip down town it would have occurred to a reasonably prudent person in the position of the conductor that the deceased was in a critical condition and in need of immediate medical attention, and that it was im

prudent to the point of rashness longer to indulge in the assumption, first made without any investigation whatever, that the passenger was drunk.

It remains to consider whether there was evidence from which the jury could have found that the omission of duty which the defendant owed the deceased was the proximate cause of his death. It is, of course, possible that the first hemorrhage might have produced death even with the best of care. It is rarely possible to establish with absolute certainty the fact to be proven in such cases. Reasonable certainty, however, is all that is required. The medical evidence, and all the surrounding circumstances, tend to show that the first hemorrhage was slight and not fatal, and that the result of carrying the deceased for five hours in an upright position in a street car with the attendant jolting increased the hemorrhage and thus produced complete coma and ultimately death. Medical experts gave their opinion that, if the deceased had had proper care within from one to two hours after the first attack, it was reasonably certain that his life could have been saved. Whether the hypothetical questions included all of the facts which should have been put before the witnesses is not the question now under consideration. The evidence was received and, though perhaps weakened on cross-examination, its force and effect were for the jury. Had the objections been sustained any omissions might have been supplied. The question of the sufficiency of the evidence to present a question of fact must be determined on appeal by the evidence actually received, and we are of the opinion that that evidence presented a question for the jury, both as to the defendant's negligence and as to whether that negligence was the proximate cause of the death. The Appellate Division, therefore, erred in dismissing the complaint.¹

CITY OF JACKSON v. ANDERSON.

SUPREME COURT OF MISSISSIPPI, 1910.

[*Reported 97 Miss. 1.*]

SMITH, J., delivered the opinion of the court.

Judgment was rendered in the court below, against appellant, and in favor of appellee, for the sum of \$500 damages, alleged to have been sustained by her by reason of the failure of appellant, under its contract, to supply her premises with water for domestic purposes.

Appellant owns and operates a system of waterworks, by means of

¹ See *Fagan v. Atlantic*, C. L. R. R., 220 N. Y. 301.

which it furnishes water to its citizens, charging a certain rate therefor. Water is distributed to consumers by means of water mains laid in the streets; the premises of consumers being connected therewith by lateral service pipes extending from the main pipe to the street line of such premises. At the junction of the service pipe with the main pipe is placed a cock, called the "corporation cock," by which water is let into the service pipe, and by which it is turned off and on. From about the 15th of May to the 20th of July, appellee's water supply was wholly inadequate for domestic purposes; in fact, she obtained practically no water at all. Several complaints were made to the proper city officials by appellee, who stated to her, or rather to her agent, that the defect was in appellee's pipe, and not in those of the city. Appellee's failure to obtain water was caused by an obstruction in the corporation cock, by which water was let into the service pipe connecting the main with her premises. After suit was instituted in the court below, this obstruction was by the city removed.

It is not necessary for us to consider or determine to whom the service pipe belongs, or under whose control it is. It is either clear from the evidence that the corporation cock is under the exclusive control of the city, or it was for the jury to say, under the evidence, under whose control it is; and by their verdict they have said that it was under the control of the city. It was therefore the city's duty to remove this obstruction within a reasonable time. This it failed to do, thereby becoming liable to appellee for damages sustained by her by reason thereof.

The verdict, which was limited by the instruction of the court to actual damages, is not excessive. Appellee's damages are not necessarily limited to actual money losses. She is entitled in addition thereto to compensation for the trouble, annoyances, and inconvenience suffered by her on account of being deprived of water, an article so necessary for so many domestic purposes. *Telegraph Co. v. Hobart*, 89 Miss. 261, 42 South. 349, 119 Am. St. Rep. 702.

The judgment of the court below is affirmed.

STEAMBOAT LYNX v. KING.

SUPREME COURT OF MISSOURI, 1848.

[12 Mo. 272.]

KING AND FISHER brought their action against the S. B. Lynx, on a contract of affreightment. A parcel of wheat (880 sacks) was shipped on board the Lynx and her barges, from a place in Illinois, above the lower rapids, consigned to K. & F. at St. Louis. The barge that con-

¹ See Ill. Cent. R. R. v. Harper, 83 Miss. 560. — Ed.

tained the wheat was brought down in tow by the Lynx, to the head of the rapids. The water was too low for the boat to descend the rapids with her barges in tow, and therefore the barge which contained the wheat (and other wheat belonging to others), after being lightened by putting 200 sacks of wheat on board of the Lynx, was taken down to the foot of the rapids at Keokuk, in safety, and in the manner accustomed there, and was moored there in the accustomed place, and was staunch and well manned. In the after part of the same day, while the barge was waiting for the Lynx to descend the rapids, a violent storm arose, and forced a great quantity of the water of the river over the gunwale and into the barge, by which a portion of the wheat was wet. Every effort was made by the crew to protect the barge and its cargo from the storm and wetting. The hands worked all night, and part of the next day, to free the boat from water. The storm and wetting of the wheat occurred in the evening and night of Tuesday, and in the afternoon of Wednesday, the Lynx descended the rapids, and taking the barge in tow, ran down to St. Louis in thirty hours, arriving there on Thursday evening, and delivered the freight on the levee next day, Friday.

The time was the latter part of May, and the weather very warm and damp, with frequent rains.

The defendant moved the court for the following instruction :

“If the jury believe from the evidence that the wheat in question was damaged by an unavoidable accident of the river, and not by the negligence of the officers and crew of the Lynx, they ought to find for the defendant, as to the wheat.”

Which instruction the court refused to give, but gave to the jury, at the instance of the plaintiffs, the following :

“It was the duty of the defendant to use all the means in his power to cause the wheat to be dried after it was wet by the storm; and if the jury believe from the evidence that the wheat might have been dried by the defendant, and he did not do it, then the defendant is liable for all damage to the wheat by reason thereof.”

Under this instruction, there was a verdict for the plaintiffs, and a motion for a new trial, which was overruled; and the defendant brings the case here by writ of error.

SCOTT J.¹ There is no doubt that the master of a boat is bound to take all possible care of the cargo, and he is responsible for every injury which might have been prevented by human foresight and prudence and competent naval skill. He is chargeable with the most exact diligence. 3 Kent, 213. If, in a voyage on our rivers, a cargo sustains an injury by an inevitable accident, it is the duty of the master to use the most exact diligence to countervail the effects of it. The occurrence of the accident does not relieve him from the responsibilities of a common carrier with respect to the injured cargo. He is still bound to the strictest diligence for the preservation of it, and to use

¹ The concurring opinion of NORTON, J., is omitted. — Ed.

all reasonable exertions to retrieve it from the consequences of the accident. But this is to be understood that such exertions are consistent with the usages of our inland navigation. If a portion of a cargo, consisting of a variety of articles, and belonging to various owners, is injured, will the voyage be suspended to the prejudice of all others, that the injury of the one may be repaired? It is obvious that, in such cases, the conduct of the master must be governed by the circumstances under which he is acting. The instruction of the court would require the master to delay his voyage, go ashore, and take measures for the drying of the wheat. Could the wheat have been dried on board the boat, proper exertions should have been used for that purpose. The instruction of the court, in my opinion, was too broad and indefinite.

NOTARA v. HENDERSON.

EXCHEQUER CHAMBER, 1872.

[*L. R. 7 Q. B. 225.*]

WILLES, J.¹ This is an action by the shippers of beans on board a steamship called the *Trojan*, for a voyage from Alexandria to Glasgow, against the shipowners, for an alleged neglect of the master to take reasonable care of the beans by drying them at Liverpool, into which port the vessel was driven for repairs, by an accident of the sea, from the direct and proximate effect of which the beans were wetted; and from the remote effects of which, for want of drying, they were further seriously damaged.

The bill of lading was subject, amongst other exceptions, to the following, viz., “loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind, excepted;” and it gives “liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever.”

The vessel in the course of her voyage stopped at Liverpool, and on the 24th October, 1868, on her way out, came, without any fault, into collision with another vessel. The result of the collision was that she was driven ashore in an exposed place, where the beans became soaked with salt water, and the vessel herself received an injury which made it necessary that she should put back to Liverpool for repairs. She was there put into a graving dock for that purpose on the 27th, and temporarily repaired, in order to proceed to Glasgow. For the purpose of lightening the ship, and to facilitate the repairs, about one-fourth of the beans were transhipped into lighters, and for a like purpose other part was removed and spread out in the after part of the ship. When the ship was repaired, the beans were, without being

¹ Part of the opinion only is given. — Ed.

dried or otherwise looked after, replaced in the wet state. On the 30th of October the ship proceeded to Glasgow. The beans were materially damaged by not being dried at Liverpool.

The beans might, at Liverpool, have been removed to warehouses for the purpose of being spread out and dried, and such accommodation might have been found within half a mile of the graving dock. This would have caused a material benefit to the beans, and materially checked the process of decomposition. The expense of unshipping, drying, and reshipping, according to the finding in the case, which must be regarded as a finding in fact, would have been particular average, payable by the owner of the cargo; and that must be taken, therefore, to have been a reasonable and proper course to pursue, so far as the shippers' interest was concerned.

It is not stated in the case what risk, trouble, expense, or delay, the drying would have caused. In the absence of any statement that either was unreasonable, and acting upon the power of "drawing inferences" given by the special case, the Court below appear to have arrived at the conclusion of fact, that the unshipping, drying, and reshipping of the cargo were, under the circumstances, as to time and otherwise, reasonable and proper acts to be done by the person having charge of the cargo, assuming that there was any legal duty imposed upon him to take active steps for that purpose.

During the stay of the vessel at Liverpool, the shippers, who were on the spot, called the shipowners' attention, through their agent, also on the spot, to the state of the beans, and to the fact that they would be seriously injured unless dried at once, and they requested that either the beans should be taken out and dried, and then reshipped for Glasgow, or that they should be delivered at Liverpool at a proportionate freight, so that the shippers might dry them for themselves. The shipowners refused to accede to either alternative. They offered to deliver at Liverpool, upon being paid the whole freight; but insisted that, unless the whole freight was paid, they had a right to retain and carry on the beans, undried, and getting worse for want of drying, as they were, in order to earn the whole freight upon arrival at Glasgow, provided the beans arrived in specie, whatever might be their condition.

The shippers refused to pay more than the freight *pro rata*, and the shipowners took on the beans without drying them, and thereby occasioned further damage to the beans, which, quite exclusive of the damage proximately and necessarily caused by the collision, and limited to the consequence of the neglect to dry (of course calculated after allowing for the estimated expense of unshipping, drying, and reshipping), has by consent been assessed at £666 1s. 5d.

The value of the cargo at Glasgow, but for the collision and its results, proximate and remote, would have been £3500. The value

in the state in which it arrived was £1167 7s. 8d. The entire loss caused, whether proximately or remotely, by the collision was, therefore, £2332 12s. 4d., out of which the remote loss caused by neglect to dry amounts to £666 1s. 5d. The shippers do not claim in respect of the damage necessarily caused by the collision and its unavoidable results, but only for the estimated aggravation of that damage by reason of nothing having been done in the way of drying to arrest or mitigate decomposition, and for that amount (£666 1s. 5d.) they obtained judgment in the Court of Queen's Bench.

Upon that judgment the shipowners have assigned error, alleging that they were entitled to retain and take on the beans in their wet state, and were not bound to do anything to check the damage occasioned by the collision.

The case was very fully and ably argued by Mr. Field for the defendants and Mr. Milward for the plaintiffs, before the Lord Chief Baron, Martin, Channell, and Cleasby, BB., and Willes, Byles, and Keating, JJ.; and we took time to consider our judgment.

The question thus raised is a compound one of law and fact: first, of law, whether there be any duty on the part of the shipowners, through the master, to take active measures to prevent the cargo from being spoilt by damage originally occasioned by sea accidents, without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; and secondly, of fact, whether, if there be such a duty, there was, under the circumstances of this case, a breach thereof in not drying the beans.

The law, up to a certain point, is clear and well settled by authority. The shippers, though upon the spot, were not entitled to the possession of the beans for any purpose without paying the full freight to Glasgow. That freight was not due, but the shipowners were entitled to retain the goods as a security for earning it. The offer of *pro rata* freight may have been reasonable, but it was one which the shipowners were not bound to accept; and it must be treated as an attempt to compromise, not affecting the rights of the parties, though it may bear upon the reasonableness of the course pursued, assuming such reasonableness to be material in determining the question of neglect.

It was argued for the shipowners that the fact of the shippers being upon the spot negatived any implied duty on the part of the master, as agent of necessity, to take care of the goods; but this argument will not bear examination. The shippers were present, but they could not lawfully touch the goods without leave. The shipowners refused to let them do so without payment of a sum not yet earned, and insisted upon retaining the goods, with the rights and consequently the duties, of the original bailment, whatever those might be. The shippers thereupon insisted upon the

goods being properly taken care of by the shipowners, who retained the control of them as a pledge for their freight.

That a duty to take care of the goods generally exists cannot be doubted; and the question raised is, whether it extends to incurring expense and trouble in preserving the cargo from destruction or serious deterioration from the consequences of sea accident, for which originally the shipowners were not liable, by unshipping and drying it, where that is a reasonable and ordinary course to take, and would certainly have been adopted by the shippers if the whole adventure had been under their control and at their risk. . . .

The existence of such duty to take active measures for the preservation of the cargo from loss or deterioration in case of accidents is, however, distinctly recognized in the maritime law in one important particular, — wherein it follows the civil law, which, though it be not recognized as *jus commune*, either here or abroad, in mercantile or maritime affairs (see Baldasseroni, *leggi del cambio*, 31) has been the source of many valuable rules, — namely, that the master may incur expense for the preservation of the cargo, and may charge such expense against the owner of the cargo in the form of particular average. This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional and not obligatory. There is, however, this marked distinction, that the master, as representing the shipowner, has the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who are under obligation to take care of and preserve the goods as bailees. Pothier, *Obligations*, art. 142, and *Nantissement*, art. 29 *et seq.*, and as to extraordinary expenses, art. 60, 61; and also under the special head of care imposed upon masters, *Louages Maritimes*, *Charte-partie*, art. 31. This obligation on the part of the master has been commonly recognized, both in respect of preserving goods on board in a state of safety by pumping, ventilation, and other proper means, and of saving goods which by accident have been exposed to danger. Thus, even in case of wreck, it is laid down, in a work on sea laws, approved by Lord Stowell (1 Hagg. Adm. at p. 232), that the master “ought to preserve the most valuable goods first, and by attention and presence of mind endeavor to lessen the evil; and save, or help to save, as much as possible:” Jacobsen, book 2, chap. i. p. 112. It is recognized in the French Code generally in Article 222; and as to the right to charge the cargo with particular average for extraordinary expenses incurred to preserve it, in Article 403 [2]; in the Spanish Code in Article 935 [1] as to like expenses; and in the German Mercantile Code, with its usual good sense and fulness, in Article 504; where the duty of the master to take care of and

preserve the cargo for its owners, at their expense (Article 722), in case of accident, and for avoiding or *lessening* the loss thereby occasioned, is specially enforced and provided for, to an extent, perhaps, beyond what our own law has yet been held to recognize. The master is to take every possible care of the cargo during the voyage, in the interests of all concerned. When special measures are required to avoid or lessen a loss, he is to protect the interests of the owners of the cargo, as their representative, under their direction, if possible, otherwise according to his own discretion, giving an account of what he has done. He is, in such cases, specially authorized to discharge all or part of the cargo. In extreme cases to avert considerable (*erheblicher*) loss, on account of imminent deterioration or other causes, he may resort to sale or hypothecation, to procure means for its preservation or transport. He is to reclaim it in case of capture or detention, and to take all extrajudicial or judicial steps for its recovery, if otherwise taken out of his charge.

There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship and for their interest. As, for instance, in the case of a perishable cargo so damaged by salt water that it could not, in its existing state, be taken forward in specie to the port of discharge, so as to earn the freight, but which could, at an expense considerably less than the freight, be dried and carried on. In such a case, to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it, or abandon it, would give no right to freight *pro rata* against the owner of the cargo, nor any right to recover against the underwriter upon freight: *Mordy v. Jones*, 4 B. & C. 394, recognized in *Philpott v. Swann*, 11 C. B. (N. S.) at p. 281; 30 L. J. (C. P.) at p. 360. In *Mordy v. Jones*, 4 B. & C. 394, the cargo was so damaged that it would have cost more than the freight, though less than the value of the cargo, to restore it, and no question arose as to the right of the owner of the cargo, because he consented to the sale. But we are at present supposing a case in which it would have been for the shipowner's interest to dry and save the goods; as, if the freight were £1000, the expense of drying £100, and the rest of the voyage so long that, but for the drying, fermentation would destroy the specific character of the cargo before arrival. In such a case, if the process were also for the benefit of the owner of the cargo, the expenses would have fallen, according to the ordinary practice, upon the cargo as particular average. It is clear, therefore, that there are cases in which it is the duty of the master to save and dry the cargo, even as between him and his owner, though the expense of his performing that duty fall upon the cargo saved. Can it be that this duty of taking care of the cargo by active measures, if necessary, at the expense of the cargo, is owing only to the ship-

owner, or that it is other than a duty to take reasonable care of the cargo, both in its sound state and in arresting the damage to which it has become liable by accidents of the sea, for the benefit of all who are concerned in the adventure?

In the result it appears to us that the duty of the master, in this respect, is not, like the authority to transship, a power for the benefit of the shipowner only to secure his freight, *De Cuadra v. Swann*, 16 C. B. (N. S.) 772, but a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability. . . .

For these reasons we think the shipowners are answerable for the conduct of the master, in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool.

This raises, in the end, the question of fact, whether there was a breach of the duty thus affirmed, a question which, though properly one for a jury, we are, under the power given in the special case, to draw inferences of fact, and the 32d section of the Common Law Procedure Act, 1854, bound to determine. It is obvious that the proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty.

In the present case the circumstances affecting the propriety of drying the beans are not stated in detail, and a good deal is left to our general knowledge and experience. It is common knowledge that beans are a cargo which specially suffers from damp, that the effects of the damp spread and are aggravated from hour to hour, that such a cargo, therefore, if damp, ought to be dried, if reasonably possible, and not sent on in a state of fermentation. It must be taken from the finding as to particular average, that such drying would have been a reasonable and prudent course in the interest of the shippers, and one which they would have been sure to take if they had been owners of the whole adventure. The facts stated are all in favor of the conclusion that the beans might have been dried, during an insignificant delay, at a moderate expense, which there would have been no difficulty in providing from or upon the credit of the shippers; and no circumstance is stated to show any special risk, trouble, inconvenience, or other objection. The master thought proper, as he was entitled to do, to reject the offer of the shippers to take the beans out of his hands upon terms not unreasonable, and insisted, as he was entitled to do, upon keeping them in pledge for the future freight; and having done so, he thought proper to reship and replace a large part of them and put to sea with them in a state in which no prudent or reasonable man would have shipped or put to sea with them, taking the risk of their arriving at Glasgow just in the state of beans, so as to carry full freight for the shipowners, but largely deteriorated by the fermentation during the transit.

We thus agree with the Court below, that the duty exists in law, and that, under the circumstances, the breach of duty is sufficiently made out in fact, and that the defendants, as shipowners, are liable in damages.

The judgment of the Court of Queen's Bench must therefore be affirmed.

Judgment affirmed.

AMERICAN EXPRESS CO. v. SMITH.

SUPREME COURT COMMISSION OF OHIO, 1878.

[33 *Ohio St.* 511.]

THIS action was brought to recover the value of a lot of peaches shipped, by defendants in error, from Fort Ancient, Ohio, to New York city. The first lot, of eight bushels, were shipped Friday, September 11, 1868. Saturday morning, September 12th, twelve bushels or boxes were shipped, and forty-four in the evening of the same day. At nine o'clock, P. M., of that day, a bridge, over East Canada creek, twenty-eight miles east of Utica, on the New York

Central Railroad (the express route), was washed away by reason of heavy rains. Travel was thus interrupted for several days. When the peaches reached the break it was found impossible to get them around it, and, as they showed signs of delay, they were sold by the express company.

In the court of common pleas judgment was recovered, against the express company, for the sum of \$400. The cause, having been taken to the district court, was there reserved for decision in the Supreme Court.

WRIGHT, J. The first lot of peaches, shipped on the 11th of September, Friday, reached Buffalo so as to leave that point Saturday night, the 12th, arriving at Utica three o'clock Sunday morning. Here the car was stopped by the railroad company, as no means could be found to get around the break, which was twenty-eight miles further on. Upon the evidence we do not think the express company can be charged with a want of diligence in failing to get their freight past the obstruction. They seem to have used every exertion in their power to discharge their duty in this behalf. In order to get the goods over the break, it was necessary to wagon them about a mile and a quarter. As soon as the agents of the express company heard of the accident they repaired to the spot, and endeavored to forward their merchandise. They attempted to hire wagons, but the railroad company had anticipated them, and engaged all the teams and vehicles that could be found in the country, for the purpose of transporting passengers and their baggage. It was, therefore, not until Tuesday, the 15th, that any facilities of the kind could be had, and then the company began the movement of express stuff, but this was too late, as far as the peaches were concerned. Nor was the express company in fault in the matter of the falling of the bridge, as is claimed. And for the purposes of this case it may be conceded that the express company is responsible for the default or negligence of the railroad company, if any there be.

The railroad company were about removing an old bridge at East Canada creek, for the purpose of building a new one of iron. As a temporary matter, a number of bents were put under the old bridge, to strengthen it. There then came a heavy rain; the testimony shows it to have been of unusual violence. The water rose rapidly, broke away dams, and carrying down logs and drift against the bridge, swept it off.

The evidence leaves it beyond a doubt that the storm and the freshet were altogether beyond any thing of an ordinary character, and responsibility for this can not be charged upon the railroad company. Nor can we find any fault in the railroad company in not repairing the damage sooner than was done, as would have been the case under ordinary circumstances. It is shown to be well provided against disasters of this kind. Duplicate bridges are kept on hand all the time, and as a general thing a bridge can be replaced in from six to

twelve hours. Upon this occasion, however, it was long before the water in the stream resumed its natural level, and this delayed the operations of the bridge builders.

But it is said that the express company, as soon as they heard of the break, should have diverted the peaches by some other route, so as to have gotten them to New York more speedily. It seems there was a route from Buffalo to New York, over the New York and Erie Railroad, upon which the United States Express Company ran; and it is also said that the peaches might have been brought from Utica back to Syracuse, and then delivered to the United States Express Company and shipped to New York by way of Binghamton; and again, that the peaches might have been delivered at Columbus, Ohio, and so have gone to New York by the Pennsylvania Central.

As to this last suggestion, the last lot of peaches left Fort Ancient at 6.20 Saturday night, and probably reached Columbus not far from the time the bridge was swept away, and there is nothing to show that the disaster was known at Columbus before the peaches reached there, so as to make the diversion a profitable thing.

As to bringing them back to Syracuse, this would have required a cartage at that point of about three-quarters of a mile, forty-eight hours to reach New York, and cartage again at Jersey City and ferriage across the river, all of which would almost certainly have involved a total destruction of the fruit, from the condition they were in, as will be hereafter seen.

As to diverting them at Buffalo. The first lot of eight bushels passed that point, leaving there at 6 p. m., three hours before the break. There can, therefore, be no possible reason for saying they should have been diverted there, as suggested. The other two lots left Buffalo during Monday. The United States Express Company, which ran from that point to New York, was a rival route, and there is no certainty it would have taken the property, which was perishable in its nature and already perishing in its condition. A reshipment would have involved delay, and such delay, as seems to us, would have been destructive.

Under ordinary circumstances this bridge might, and probably would, have been repaired in six hours, and travel resumed; it was fair for the express company to assume that this would be done, as doubtless would have been, had the water gone down at any usual rate, and they cannot be said to have been in fault in not anticipating what perhaps nobody thought was a probable or possible event.

There is an *ex post facto* wisdom, which, after every thing has been done, without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best lights afforded.

Had the plan suggested been in fact pursued, and the peaches trans-

shipped either by way of Syracuse or Buffalo, the delay which would have ensued, together with the rough jolting attendant upon the necessary cartage, would, as it seems to us, have ensured their entire destruction. Thereupon the shippers might, with much force of argument, have said, we shipped by your route, and you had no right to make a deviation; by so doing you subjected our property to unusual delays and risks not contemplated, and loss having ensued, you are responsible. You should have gotten it around the break with all speed, or if that were impossible, you should have sold it to the best advantage, instead of taking a course which must have necessarily led to its entire loss.

But in our view of the facts, this loss was occasioned by the condition of the property at least as much as from any other cause. These peaches were picked and shipped on Friday and Saturday, the 11th and 12th of September. The overwhelming testimony is that the weather of that week was most destructive upon this kind of fruit. It was damp, rainy, warm, and murky up to Thursday night, Friday being bright, warm, and sunny. The effect of this temperature is described by the man who shipped the peaches as having a peculiar effect upon them. They rotted rapidly. An apparently sound peach would rot in twenty-four hours. A speck on a peach would, in a few hours, develop into rot. He says the week ending September 12th was the most disastrous he ever saw. There is no controversy at all about the condition of the weather, and of its being exactly that kind that would destroy peaches in a very short time.

The first lot, shipped Friday, was to have reached New York for Monday's market, and could not have reached there earlier. They were stopped at the break, and the express agent at once concluded they ought to be sold. They were sold. This was on Sunday, before, it will be observed, they could by any possibility have reached New York, had they gone straight on without any break. What was their condition then? If spoiled and worthless, or nearly so, in Utica, could they have been any better in New York ten or twenty hours later in point of time? The express agent went to a fruit dealer in Utica to get him to buy the articles. The dealer went to see the peaches Sunday, and told the agent he would take them, if they were unloaded that night so as to get air, otherwise he would not take them on any condition. This dealer, who is a witness, describes Friday and Saturday as having been hot, sultry, rainy days — the worst kind of weather for fruit. He was on the car in which the peaches were, and says it was so close and sultry that it was very unpleasant to remain in it; that the condition of the weather was such that had they gone straight through, they would have been worthless upon reaching New York. He examined them Monday, after they had been unloaded and given air, and none of them were sound. There is much testimony of this kind, all tending to show the unfavorable condition of the weather, that the car had been close and hot, that it was wet with moisture and

vapor arising from the fruit, which had become heated and in such condition as to be past saving before it could have reached New York in the ordinary time. It therefore seems to us that the best thing to do under the circumstances was that which was done — namely, to sell the stuff at once. The express company did get one lot to Albany, but were compelled to sell them there.

These remarks as to the condition of the fruit apply to all the various lots. When they reached Utica, the testimony is without contradiction that they were in such plight that they could not have been got to New York in any way, or by any route, so that they would at all have been marketable.

We have not gone into the evidence *in extenso*, but these conclusions are abundantly supported by it. We therefore feel bound to say that the loss of the peaches was occasioned, not by any fault or negligence of the express company, but by the perishable nature of the article, in connection with the condition of the weather; and the delay which occurred at the break was something for which the express company was not responsible.

The jury, however, proceeded to render a verdict, an analysis of which shows that it was predicated upon the idea of the peaches reaching New York in a perfectly sound condition, as it is based upon the highest market price; it being at the same time perfectly apparent that had there been no break, the peaches could not have reached New York in a sound condition.

Among other things the court charged the jury:

“But if the defendant was prevented from sending them by that route in consequence of the washing away of a bridge, which did not happen through the negligence of the railroad company or the defendant, then it was the duty of the defendant, after first ascertaining that it could not send forward the peaches by that route, so as to get them to New York city in time to preserve them, to use ordinary care and diligence to employ some other safe and reliable route or agency, or express company, if such was then known and available to the defendant, by which the peaches could be carried through to New York city in time to save them.”

This was misleading, in that it drops out of view the actual condition of the peaches at the time when they ought to have been sent forward upon this supposititious other route. Clearly, if they were rotten and entirely worthless upon reaching the point where this transshipment could have been made, there would have been no sense in sending them on. The jury should have been told to take into view the circumstances as they actually were — the condition of the weather and of the fruit — and under proper instructions should have determined whether the company were bound to seek some other route for transportation.

In the view, however, that we take of the evidence, plaintiffs made no case for recovery, and the judgment should be reversed.

Judgment reversed.

DUDLEY v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1906.

[58 W. Va. 604.]

POFFENBARGER, J.¹ . . . The bill sought a decree for the value of two car-loads of apples, shipped by the plaintiff over the Baltimore and Ohio South-Western Railway and connecting lines to Elgin, Ill., and consigned to the plaintiff himself, with directions to notify J. W. Sharp, of Chicago, Ill., of the arrival of the cars at their destination. Expecting Sharp to accept, and pay for, the apples, plaintiff had made drafts upon him for their value, as per contract, attached the bills of lading to them, and discounted them at the First National Bank of Parkersburg, and said bank caused them, in due course of business, to be presented for payment at the office of Sharp.

Upon notice of the arrival of the cars, Sharp's agent was allowed to inspect the apples, without producing the bills of lading or showing any title or right to the possession of them. Sharp had not then paid the drafts, nor did he afterwards do so. His agent reported that the apples were not such as the plaintiff had agreed to deliver. He immediately notified Dudley, and, presumably the railway company also, for very soon afterwards the agent of the company notified Dudley, by telegraph, of Sharp's refusal, and called upon him to arrange for disposition of the apples, and continued, by subsequent dispatches, from October 24, 1899, until November 3, 1899, to demand that he take care of them. Notice of the intention of the railway company to have them sold was given October 28th. The last telegram, dated November 3rd, notified him that the apples were rotting on the track, and closed with the inquiry, "shall we sell for your account?" To this Dudley replied as follows: "Have made claim against Baltimore & Ohio South-Western Railroad for full value of cars; they were wrongfully delivered. If you sell it will be as agent of the Company and for its benefit." After a futile attempt to sell the apples at Elgin, the railroad company shipped them to Chicago, where they were sold for the sum of \$397.93, which, after deducting freight charges of \$144.84, paid, except, as to its own, by the defendant, upon the guaranty of the B. & O. S. W. Ry. Co., left \$253.09, which was tendered to the plaintiff, but refused by him, because he claimed a larger amount. . . .

Claim for the value of the property, as for a conversion thereof, is also predicated upon the sale of it. Whether sale could have been made for the charges for carriage, without a judicial proceeding by way of enforcement of the lien, seems not to have been raised. That depends upon whether there is an Illinois statute authorizing such sale.

¹ Part of the opinion only is given. — ED.

But it is said sale could not be made therefor in this instance because the B. & O. S. W. Ry. Co. had guaranteed the charges. But if that agreement was a mere guaranty, and not an absolute undertaking to pay, it was the duty of the defendant company to collect its charges on the delivery of the property. If by due diligence it could not do so, it might fall back upon the guaranty. However this may be, there was a clear and undoubted right of sale in the defendant upon another ground. The property was perishable, and was then decaying and becoming less valuable every day. The owner having failed in the effort to make sale of the apples, as he expected, neglected to take them out of the possession of the company and take care of them. More than that, his telegram of November 3, 1899, could be construed as nothing more nor less than a notification that he would treat the apples as the property of the railroad company, sue for their value and leave them in the hands of the company. This he had no right to do, as has been shown. What could the defendant do under the circumstances? Could it allow the property to decay? Perhaps it was under no duty to protect the plaintiff from a loss of his own making. This we do not decide, but a clear and undoubted right it did have to sell the property under such circumstances, and, after deducting its charges, pay the residue of the proceeds to the owner. It was still the custodian of the plaintiff's property and bound, as such, to do whatever was necessary to mitigate and prevent, as far as possible, the natural loss, incident to the decay of fruit. "Where the goods are of a perishable character and the consignee will not accept them, or there are other reasons requiring a sale without delay, the carrier may be justified in selling the goods because of the necessity of the particular case." Elliott R. R. § 1571.

"But while in the possession of the goods in the character of carrier, he also stands for many purposes in the relation of agent for the owner; and it is a general rule of law that, although the powers of agent are ordinarily limited to the purposes for which they are employed, yet that emergencies may arise in which, from the necessities of the case, an agent may be justified in assuming extraordinary powers; and that his acts, done fairly and in good faith under such circumstances, though entirely beyond the scope of his ordinary powers, may be binding upon his principal. Such emergencies sometimes occur, in the course of the business of the carrier, in which he becomes the agent of all concerned, and in which his acts, in the exercise of a sound discretion, will be binding upon all the parties in interest; and, if the necessities of the case require that the goods be sold, he not only may sell, but it becomes obligatory upon him to do so, for the benefit of the owner. If, for instance, the consignee refuse to accept the goods, and they are of a perishable character, and if stored would, from rapid decay, be totally lost to the owner, it would be the duty of the carrier to sell them on his account; and the same rule would apply if, from any cause, it became impossible to deliver the goods according to the

directions of the owner or bailor, or to return them before they would inevitably perish from such inherent tendency, from damage received by them in the transit, or from any other cause." Hutchinson on Carriers, § 432.

If, as to the property so left on its hands, the railway company is to be regarded as a warehouseman, its right to sell the same, to prevent loss by the decay thereof, is equally clear. Any kind of imminent danger of loss or destruction will justify a sale in such case. Rea's Admx. v. Trotter, 26 Grat. 585; Jordan v. Shireman, 28 Ind. 136.

SECTION IV. DELIVERY.

GOLDEN v. MANNING.

KING'S BENCH, 1773.

[2 W. Bl. 916.]

CASE against the defendants, as common carriers, for not carrying and delivering two pieces of silk from Birmingham to the use of the plaintiff at the house of Samuel Ireland in London; and another count on a special agreement to carry and deliver the said silk safely and securely in a reasonable time, and neglecting so to do. Plea to the first count, "Not guilty," to the last, *Non assumpsit*. On trial, verdict for the plaintiff, subject to the opinion of the Court on this case: The defendants, being common carriers from Birmingham to London, on the 7th June, 1771, received a box, containing two pieces of silk, directed to Mr. Ireland, Spitalfields, London; which came to their warehouse in London on the 8th of June, with no legible directions upon it, where it remained for a year, at the end of which the plaintiff and Ireland settling their accounts discovered the mistake of this box having been sent by the Birmingham coach, and never delivered. The plaintiff went to the warehouse and found the box, and a letter of advice from the plaintiff to Ireland, together with the silks therein. But the silks had received damage to the amount of £29 14s.; wherefore the plaintiff refused to take the box, and the defendants refused to make satisfaction for the loss. The defendants never gave any intelligence of the arrival of the box, though the name of Samuel Ireland (and no more) appeared in their way-bill, and his name and place of abode were inserted in a printed directory kept in the defendants' warehouse: That the defendants keep a porter at a stated salary to carry out goods which come by their coach, and receive the portorage to their own use.

This case was argued by Walker, for the plaintiff, and Glyn, for the defendant; and

By GOULD, J. (*absente* DE GREY, C. J.). There is no occasion to enter, as has been done at the bar, into the general question of the

duty of common carriers: though it is held in *Owen*, 57, that all carriers are bound to deliver as well as carry the goods. But this case depends on its own special circumstances. The defendants certainly must be understood to have contracted to carry these goods on the same terms and in the same manner that they carried other people's. And it appears that their general course of trade was to deliver goods at the houses to which they were directed; that they received a premium, and kept a servant for that special purpose. This box came directed to their warehouse at Birmingham. That the direction was afterwards defaced was owing to their own neglect. They had Ireland's name in their way-bill, and might have found him out by their directory. Therefore here is a gross and palpable negligence on the part of the defendants; who, whether bound to deliver or not by the general duty of carriers, had undertaken so to do by their general course of trade: and indeed I think that all carriers are bound to give notice of the arrival of goods to the persons to whom they are consigned, whether bound to deliver or not.

BLACKSTONE and NARES, Js., of the same opinion on the circumstances of this case, but avoided entering into the general question.

Postea to the plaintiff.

HILL v. HUMPHREYS.

SUPREME COURT OF PENNSYLVANIA, 1842.

[5 W. & S. 123.]

SERGEANT, J. This is not a question whether a delivery at the wharf, which is the usual place of delivery, with notice to the consignee, is a delivery to the consignee, as was ruled in *Cope v. Cordova*, (1 Rawle, 203), in relation to goods coming from a foreign port. For here the carrier undertook to deliver the goods to the consignee, who refused to receive them, and, being taken back, they were damaged by the rain. The question is, whether the consignee was bound to receive the rags; and that depends upon whether the delivery was reasonable in respect to time, place and manner. This was a question for the jury, depending on all the circumstances attending the transaction. If the goods were tendered late in the day, at the termination of the hours of business, and when the consignee had dismissed his hands, and was incapable of receiving and putting away the goods, then the delivery was unreasonable as to time, and the consignee was guilty of no fault or laches in refusing them. The duty of the carrier in such case was to take them back, and keep them safely under all his responsibilities as carrier, in a store, or under safe custody. Such a delivery did not discharge him from his liability as carrier, and the damage which ensued must be borne by him. All the circumstances

were for the consideration of the jury, and were left to them to determine on the reasonableness of the notice of delivery. We therefore see no error in the charge of the court.¹ *Judgment affirmed.*

RICHARDSON v. GODDARD.

SUPREME COURT OF THE UNITED STATES, 1859.

[23 How. 28.]

GRIER, J.² . . . The barque Tangier arrived in the port of Boston on the 8th of April, with a cargo of cotton, intending to discharge at Battery wharf; but at the request of the consignees, and for their convenience, she "hailed up" at Lewis's wharf. She commenced the discharge of her cargo on Monday, the seventh, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. The unlading was commenced in the afternoon, and was continued through the forenoon of Tuesday, when, the cotton not being removed, the wharf became so full that the work was suspended. Notice was again given to the consignees; and they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen on Monday and Tuesday was removed, excepting 325 bales, which remained on the wharf over night. On Thursday morning, the wharf was so far cleared that the unlading was completed by one o'clock p. m. On that day, the libellants took away about five bales, and postponed taking the rest till the next day, giving as a reason that it was Fast Day. About three o'clock of this day, the cotton remaining on the wharf was consumed or damaged by an accidental fire.

The contract of the carrier, in this case, is "to deliver, in like good order and condition, at the port of Boston, unto Goddard & Pritchard."

What constitutes a good delivery, to satisfy the exigency of such a contract, will depend on the known and established usages of the particular trade, and the well-known usages of the port in which the delivery is to be made.

A carrier by wagon may be bound to deliver his freight at the warehouse of the consignee; carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.

There is no allegation of a particular custom as to the mode and place of delivery, peculiar to the city of Boston, which the carrier has

¹ *Acc. Marshall v. American Express Co.*, 7 Wis. 1. — ED.

² Only so much of the opinion as discusses the question of proper delivery is given. — ED.

not complied with. The general usages of the commercial and maritime law, as settled by judicial decisions, must therefore be applied to the case. By these, it is well settled that the carrier by water shall carry from port to port, or from wharf to wharf. He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. But to constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody.

Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian, before the consignee had proper time and opportunity to take them into his possession and care, would not fulfil the obligation of his contract. When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment.

Applying these principles to the facts of this case, it is clear that (saving the question as to the day) the respondents are not liable on their contract of affreightment for the loss of the goods in question. They delivered the goods at the place chosen by the consignees, and where they agreed to receive them, and did receive a large portion of them, after full and fair notice.

The goods were deposited for the consignees in proper order and condition, at mid-day, on a week day, in good weather. This undoubtedly constituted a good delivery; and the carriers are clearly not liable on their contract of affreightment, unless, by reason of the fact next to be noticed, they were restrained from unlading their vessel and tendering delivery on that day.

Let us inquire, then, first, whether there is any law of the State of Massachusetts which forbids the transaction of business on the day in question; 2dly. If not, is there any general custom or usage engrafted into the commercial or maritime law, and making a part thereof, which forbids the unlading of vessels and a tender of freight to the consignee on the day set apart for a church festival, fast, or holiday; and 3dly. If not, is there any special custom in the port of Boston which prohibits the carrier from unlading his vessel on such a day, and compels him to observe it as a holiday.¹

The testimony shows this, and no more: That some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work or do it privately; some work half the day, and some not at all. Public officers, school-boys, apprentices, clerks, and others who live on salaries, or prefer pleasure to

¹ The court held that the law did not forbid work on Fast Day, nor was there any general usage preventing unlading on that day. — Ed.

business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libellants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear, that however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston (if it amount to anything more than that every man might do as he pleased on that day) did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day.

On the whole, we are of opinion that the barque Tangier has made good delivery of her cargo to the consignees according to the exigency of her bill of lading, and that the decree of the Circuit Court should be reversed, and the libel dismissed with costs.

BULLARD v. AMERICAN EXPRESS CO.

SUPREME COURT OF MICHIGAN, 1895.

[107 Mich. 695.]

MONTGOMERY, J. This is an action in case, commenced in justice's court. The declaration, in substance, alleges that plaintiff is a large shipper of celery by express from Kalamazoo to places throughout the United States, upon lines of the defendant, a common carrier; that the defendant, to collect celery and other articles for shipment in the city of Kalamazoo, and to deliver packages received by it, maintains and employs a large number of men, horses, and wagons; that since December 1, 1893, plaintiff's place of business has been at No. 506 Douglas avenue, in said city; that during the celery season plaintiff makes large daily shipments over defendant's lines, and has consigned to him packages of money in payment of celery shipped C. O. D., and other articles, of all of which defendant had notice; that plaintiff repeatedly requested defendant to call at his place of business for his shipments, and to deliver packages to him, which defendant refused to do; that defendant collects for shipment from and delivers to a large number of shippers of celery and other articles, under substantially the same circumstances, conditions, and situation as the plaintiff, and for shippers at a greater distance from its place of business than plaintiff's place, and for shippers in the same locality as the plaintiff, and has unlawfully discriminated against the plaintiff by such refusal; that plaintiff has been damaged by being compelled to convey his celery to defendant's office for shipment, and procure his packages from its office. The plaintiff had judgment in the justice's

court. In the circuit court the court directed a verdict for the defendant.

The evidence on the trial showed that the defendant's agents, acting in unison with the agents of other express companies, had established limits in the city, beyond which they did not go to receive goods for shipment or to deliver packages. In some instances these limits extended a greater distance from the defendant's office than plaintiff's place of business. It was also in evidence that plaintiff knew of these limits before moving into his present place of business, and before transacting the business with defendant in which the inconvenience arose which, it is alleged, caused damage to plaintiff.

At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of a custom of receiving goods at other places. *Hutch. Carr.* §§ 82, 87; *Blanchard v. Isaacs*, 3 Barb. 388. But it is insisted that the defendant in this case, having practised the custom of receiving goods for shipment at other points in the city than its office, was bound to furnish equal facilities to all shippers who occupy a similar position. We are not impressed with the force of this reasoning, as applied to the facts in this case. We are cited to no case in which it has been held that a carrier is bound to go beyond its line to receive goods, and, while it would not be competent for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion, without being bound to go beyond them.

The duty to deliver to the consignee is somewhat broader. Carriers on land, receiving packages, were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water, or railroad companies, which must, of necessity, be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee. *Wood's Browne, Carr.* § 230; *Hutch. Carr.* § 379. The question of how far this duty may be escaped by usage is not well settled. It has been held, however, that, when the business of an office is so small that the company cannot or does not keep a messenger to make personal delivery, it is not unreasonable to require the consignee to call at the office. *Hutch. Carr.* § 380. If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this, it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company, in appar-

ent good faith, has assumed to fix limits, having regard to the public requirements, that, with regard to persons who have dealt with it, having knowledge of this fact, it is not bound to deliver beyond these limits. We do not determine what the rights of one not having knowledge of these limits would be. This is not such a case. But in this case we think the court committed no error in directing a verdict for the defendant.

Judgment will be affirmed.

GRAFF *v.* BLOOMER.

SUPREME COURT OF PENNSYLVANIA, 1848.

[9 *Pa.* 114.]

BELL, J. The defendants below are sued as common carriers, upon their extraordinary liability as insurers of the goods intrusted to them for transportation. These being destroyed by fire whilst in their possession, it is conceded they are liable to make good the loss, unless they had ceased to be common carriers at the time of the accident, by a delivery of the articles bailed to them at the place stipulated in their contract. The undertaking to transport goods to a particular place necessarily includes the duty of delivering them there in safety, and hence it follows that where the responsibility of a common carrier has once begun, it continues until due delivery be made.

In this instance the defendants, by their agents, undertook to transport the goods of the plaintiffs by canal and railroad, and deliver them to themselves at their warehouse in Pittsburgh within eight days from Philadelphia, &c. Before making this contract the defendants, in consequence of the destruction of the aqueduct by which the canal was carried across the river Allegheny to the city of Pittsburgh, had temporarily abandoned the occupancy of their warehouse at the latter place, and, for some time, had deposited the goods of their customers in a warehouse erected by them in Allegheny City, on the bank of the river, opposite to Pittsburgh, a few hundred yards from the old place of deposit. Here the goods in question were destroyed whilst waiting for a steamboat by which to send them to the plaintiffs below, and consequently before any delivery to them. It is settled that if a carrier stipulates to deliver articles at a particular town or warehouse, and does so deliver them, he is exonerated from subsequent loss, though they never come to the possession of the consignee or owner. Thus, where the engagement was to carry certain goods from Stomport to Manchester, to be thence forwarded to Stockport by the first carrier going, and they were safely delivered at Manchester, and housed by the carrier in his own warehouse to await an opportunity to forward them to the place of their ultimate destination, it was held his duty as carrier was at an end, and he was therefore not liable to answer for

the destruction of the goods in the warehouse by fire. *Garside v. The Trent and Mersey Navigation Company*, 4 T. Rep. 581. To the same effect is *Ackley v. Kellog*, 8 Cow. 223. In order to bring themselves within the saving efficacy of this rule, the defendants insist that, though not literally, they substantially fulfilled the engagement by the delivery at the warehouse in Allegheny, a place in the immediate vicinity of the warehouse in Pittsburgh, and, in fulfilment of their contract, to be considered as parcel of the latter city, being generally so considered and treated by persons residing at a distance. In support of this position, it is argued that the destruction of the aqueduct being of public notoriety, must have been known to the owner of the goods, or his agent, and he must, consequently, have been aware of the uselessness of carting the goods across the river to the deserted warehouse, where they would have been more inconveniently situated in reference to further transportation to the plaintiff, in Illinois, than they were at the warehouse in Allegheny. But there is no proof that the plaintiff knew anything connected with the subject other than was disclosed by the contract itself; and the ready answer to the defendant's position is, that they undertook to deliver at Pittsburgh and not at Allegheny. It has been repeatedly ruled that delivery at a point or place in close proximity with the place stipulated, will not relieve the carrier from his responsibility as such. Mere propinquity of delivery is no delivery. The question, in this aspect, was presented in *Hyde v. The Trent and Mersey Navigation Company*, 5 T. Rep. 389, where it was held, by all the judges, that an engagement to deliver goods at the plaintiff's house in Manchester, implied from charging the price of cartage from the defendants' warehouse in the same town to the plaintiff's house, was not discharged by a delivery at the warehouse in Manchester, and therefore the carriers were bound to make good a loss occasioned by fire at the latter place. In the course of his opinion, Grose, J., remarked: "The law which makes carriers answerable as insurers is, indeed, a harsh law, but it is founded in wisdom and was established to prevent fraud. But it would be of little importance to determine that carriers were liable as insurers, unless they were bound to see that the goods were carried home to their place of destination, since as many frauds may be practised in the delivery as in the carriage of them." The same doctrine is asserted by our own case of *Eagle v. White*, 6 Wh. 516; and the case of *De Mott v. Laraway*, 14 Wend. 226, decided by the Supreme Court of New York, is illustrative of the stringency with which it has been insisted on. There the carrier had engaged to deliver, among other things, a hogshead of molasses at a certain warehouse on the banks of a canal. While hoisting it from his boat into the warehouse, and when within a short distance of the sill of the window where it was to be received, the tackle employed in the operation parted, and the hogshead being thus precipitated into the boat below was staved, and the molasses lost. It was held the carrier was liable to make good the loss, for though on the eve of delivery,

the molasses was not delivered at the place stipulated by the parties, and so the employment of the carrier subsisted at the time of the accident, though one of the owners of the molasses was present. These cases are conclusive of this, and as they are within the policy of the rule upon which they are based, we feel no hesitancy in adopting them. They are, too, founded in reason. How can we tell whether the plaintiffs would have agreed to a delivery of their goods in a warehouse in Allegheny City? There might have existed many reasons to deter them; and a decision binding them to it would be not to vindicate the contract entered into, but to make a new one. It is certain the defendants knew they were not in the actual occupancy of their Pittsburgh warehouse when they made this agreement. If from this, or any other cause, it was inconvenient or improper to deposit goods there, they should not have so undertaken. But having done so, they assumed every risk attendant upon their non-compliance, and it is not for us, upon the strained notion that distant places may, from their nearness, be regarded as one, to take from the plaintiffs the advantage the law affords them. Their reply to the defendants, that Allegheny is not Pittsburgh, is unanswerable, and fixes them for the value of the goods spoiled.

On the argument, something was faintly said of the destruction of the aqueduct having interposed an unavoidable delay of delivery, within the meaning of the contract. These words, as used, evidently refer to the time to be consumed in the carriage between Philadelphia and Pittsburgh. But the question is not of delay of delivery — it is a question of destruction *in transitu*, before delivery made, for which no legal excuse is tendered.

Judgment affirmed.

POWELL v. MYERS.

COURT OF ERRORS, NEW YORK, 1841.

[26 *Wend.* 591.]

ACTION against the plaintiffs in error as common carriers for the loss of a trunk. The baggage was carried upon a steamboat which arrived at New York late in the evening. In the morning a negro man came on board with a forged order for the trunk; the master pointed it out to the negro, who took it away. Judgment was given in the Supreme Court against the carrier, who removed the record into this court by writ of error.¹

WALWORTH, Ch. It appears from the testimony, that the boat usually arrived at New York in the night, and though the passengers usually landed with their baggage before morning, they frequently

¹ This statement of facts is condensed from that of the Reporter. Only so much of the opinion as discusses the question of misdelivery is given. Verplanck, Sen., delivered a concurring opinion — Ed.

remained on board through the night. The jury, therefore, were right in concluding that the baggage left on board was in the custody of the master, in his capacity of common carrier, until it was called for at the usual time in the morning, after his arrival at his place of destination. The owners of the boat, in whose custody the trunk was, were therefore clearly liable for the misdelivery thereof to the colored man, upon the forged order, and were rightfully charged with the loss. Even in the ordinary case of a bank which pays out the money of a depositor upon a forged check, in his name, the institution, and not the depositor, must sustain the loss. So too, the warehouseman, who is not liable to the same extent as the common carrier, has been held liable for delivering the goods entrusted to his care to the wrong person, where such delivery was by mistake merely and not intentionally wrong. See *Devereux v. Barclay*, 2 Barn. & Ald. Rep. 702.

For these reasons I think the decisions of the judge who tried the cause, and of the supreme court, were correct, and that the judgment should be affirmed.¹

CORK DISTILLERIES CO. *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO.

HOUSE OF LORDS, 1874.

[*L. R. 7 H. L.* 269.]

In this case the Plaintiffs complained of the wrongful delivery by the Defendants of several puncheons of whisky, which had been intrusted to the Defendants to carry from Cork to Limerick, to be delivered at the Customs warehouse there.²

The facts were these: The Plaintiffs were distillers in Cork; they were under the bond alleged in the declaration; they sold twenty puncheons of whisky to J. Stein & Co., of Limerick, and these puncheons were delivered to the Defendants to be carried to that place. The delivery notes were all in the following form:—

“Delivered at the Great Southern and Western Railway Co. in good order.

“Customs Warehouse, Limerick, &c.

“One puncheon | Hds | Trs | Qr, casks | of whisky.

“For Messrs. John Stein & Co., Limk. Station, Limerick.

“Cork Distilleries Co. (Limited).”

The receipt note was in this form:—

¹ See *acc.* *Devereux v. Barclay*, 2 B. & Ald. 702 (wharfinger); *Little Rock M. R. & T. Ry. v. Glidewell*, 39 Ark. 487; *Claffin v. B. & L. R. R.*, 7 All. 341. — Ed.

² The pleadings, arguments of counsel, advisory opinions of the Judges, and concurring opinions of the Lords are omitted. — Ed.

"Cork, 19 Day of Feby., 1869.

"From Thomas Henry Hewitt & Co.

"Watercourse Distillery — One puncheon

"Of whisky addressed to Seymour's Customs

"Warehouse at Limerick.

"For John Stein & Co."

The permit which accompanied the puncheons was (so far as is material for this case) in the following form: "Permit Hewitt & Co., distillers of Cork, to remove from duty free warehouse at Watercourse, &c., one cask of plain British spirits, on which duty has *not* been paid, containing, &c., to Custom House at Limerick. . . . Conveyance, car and rail. . . . Bond in force." When the duty is paid the permit states the fact, and is accompanied by a card with the name and address of the purchaser.

The "Customs Warehouse" and "Seymour's Customs Warehouse, Patrick Street Limerick," are bonded or duty-free warehouses under the control of the Excise for the purpose of receiving and storing whisky on which duty has not been paid, and are situated at a distance of about half a mile from the railway station, which latter is just outside the town.

The Defendants did not deliver any of the puncheons at the customs warehouses, but J. Stein & Co. having applied for them at the railway station, they delivered the puncheons to J. Stein & Co. at that place.

Stein & Co. never paid any duty on the whisky, and the Plaintiffs were called on to do so under their bond, and paid duty to the amount of £1360 5s. It did not appear that any special communication was made to the Defendants as to these puncheons of whisky. But the Plaintiffs had been for a long time in the habit of sending whisky to houses in Limerick by the means of the Defendants' railway, in the manner above stated.

The Court was to be at liberty to draw inferences of fact.

The Court of Queen's Bench gave judgment for the Plaintiffs; Ir. Rep. 4 Com. Law, 349; but on error to the Exchequer Chamber that judgment was reversed; Ir. Rep. 5 Com. Law, 177.

The case was then brought up to this House.

LORD CAIRNS, L. C. My Lords, I am sure that your Lordships are all very much indebted to the learned Judges for the immediate consideration which they have given to the case which your Lordships have heard argued, and for the very clear and distinct answer they have given to the question propounded by your Lordships.

My Lords, in the answer of the learned Judges to that question I must say that I entirely agree. It appears to me that if there has been a difficulty raised in this case, it has arisen from the somewhat obscure and vague and unprecise statements with which we have to deal in the special case. But, passing by any minute criticisms upon those statements, what I think your Lordships find clearly

expressed in the special case is this: the Cork Distilleries Company and Stein & Co. appear from the case to have stood in the position of vendors and purchasers. The whisky in question was sold, and it must be assumed that it was in accordance with the orders of the purchasers that it was delivered to the railway company, as carriers, to be carried to Limerick. The carriage was to be paid by the purchasers, and notice was taken upon the occasion of receiving the goods for transit that it was to be so paid. If the case ended there, if there was nothing more to be considered, it would be one of the cases of the most ordinary occurrence possible. The property would have passed; the transit of the property would have been at the risk of the purchasers; the purchasers would have been the masters of the contract for conveyance, and it would have been for the purchasers to take delivery either at the place indicated at the time of the departure of the goods, or at any other place at which they afterwards preferred to receive the goods.

But, my Lords, there were beyond that, in this case, undoubtedly, special circumstances in the position of the vendors. The vendors, in order to obtain the permit necessary for the conveyance of the whisky in question without the duty being paid, were obliged to give a bond to the Customs, making themselves responsible in a penal sum of money if the goods were not carried within the time indicated, and to the place specified in the permit. The case does not state whether that bond was given by the distilleries company of their own accord, or the request of Stein & Co., or in pursuance of a course of business which would make it a matter of ordinary occurrence for all distillers in sending out goods to their customers without the duty being paid to enter into, on behalf of their customers, the bond necessary to effect the conveyance of the goods. My Lords, if I were to draw an inference upon that subject, I should say that it was absolutely impossible that persons in the position of Stein & Co. and the Cork Distilleries Company, from time to time, could have been ignorant that it was necessary that such a bond must be given in order to obtain permission for the transit of the goods. And therefore the bond would be given by the distilleries company really on behalf of Stein & Co.; and Stein & Co. would be responsible to the distilleries company if they did anything on their part to frustrate the fulfilment of the condition of that bond.

However, my Lords, that being the position of the distilleries company, I could quite understand a special contract being raised, under that state of circumstances, between the distilleries company and the railway company. I could quite understand the distilleries company either making a stipulation in this particular case, or making a general stipulation with the railway company, with regard to the conveyance of all their whiskies under permit, that the railway company must understand that the placing upon the whisky a destination to a customs or bonded warehouse was not to be treated as a mere

indication of the address for the consignee, but that it must in all cases be taken as of the essence of the contract for conveyance, and that it must be understood that there was a special engagement by the railway company with the consignors, the distilleries company, that they would carry the goods to that place, and to no other place, and that they would be liable to the consignors if, by reason of departing from that particular mode of transit, any liability should fall upon the consignors under their bond. I say I could quite understand the distilleries company coming to the railway company and explaining that that was their position, and requiring them to make a contract of that kind specially with them as consignors — a contract which, as it appears to me, might be quite separate from the other contract of conveyance with the consignees. The two contracts might well coexist together, the one making the railway company liable to the consignors according to the amount of interest which they had in the question of conveyance, and the other making the railway company liable to the consignees for the value of the goods conveyed.

But, my Lords, in order to the establishment of such a contract between the railway company and the distilleries company, I think your Lordships must be able to find that the position in which the distilleries company had placed themselves under their bond was actually and clearly made known to the railway company — that it was made known to the railway company not merely that the goods were passing under permit, but also that the bond, which had obtained the permit to pass the goods, had been given by the distilleries company, and that the tenor and condition of the bond were of the character I have described.

Now, my Lords, I must say that if those facts were made known to the railway company, nothing would have been easier than to have stated that upon the face of the case. And I observe, and your Lordships will observe, that the declaration setting out the bond goes on to aver in words which I am unable to treat as words of surplusage, or mere matters of course, that the railway company had notice of this bond. But there is not a word that I can find in the special case which states that the railway company had such notice, nor is there a statement that I can find in the special case from which I am able to draw the inference that the railway directors had such notice. And if they had not such notice, then it appears to me that the case returns into the condition in which I originally placed it before your Lordships, of a case without any special circumstances brought home to the knowledge of the carriers — a case in which there is merely a consignor and consignee, and goods delivered to be carried for the consignee, and therefore to be under his order with regard to the time and place of delivery.

My Lords. I therefore think that the judgment of the Court of Exchequer Chamber is correct; and that your Lordships will be right in following the advice given to the House by the learned Judges, and dismissing the present appeal.

PRICE v. OSWEGO & SYRACUSE RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1872.

[50 N. Y. 213.]

GROVER, J. The referee found as a conclusion of law, from the facts found, that the defendant having delivered the bags to the person who made the order for them (although in the name of a fictitious firm) without notice of the fraud, was not liable to the plaintiff therefor. To this conclusion the appellant excepted. The counsel for the respondent insists that if the legal conclusion is not sustained by the facts found, the court will assume that he found such additional facts as were necessary for that purpose. This position is correct, subject, however, to the qualification that it must appear from the case that such additional findings would have been warranted by the evidence. (*Oberlander v. Spiess*, 45 N. Y. 175.) In the present case there was no evidence warranting the finding of any additional facts sustaining the legal conclusion. The question, therefore, is whether such conclusion is sustained by the facts found. The facts (so far as material) found were: That the plaintiff, on and prior to September, 1866, was a dry-goods merchant, doing business in Syracuse. That the defendant was a common carrier of goods between Syracuse and Oswego. That a few days prior to the 10th of September, 1866, Caleb B. Morgan, a resident of Syracuse, received a letter by mail, dated and mailed at Oswego, directed to him at Syracuse, signed S. H. Wilson & Co., inquiring the price of bags. That Morgan had been a dealer in bags, but had given up the business, and upon receipt of the letter he delivered the same to the plaintiff, who kept bags for sale, and requested the plaintiff to inform him of the price of the said bags. That Morgan did not know any person or firm by the name of S. H. Wilson & Co., nor had he heard of any such person or firm, but delivered the letter to the plaintiff, believing it had been written in good faith in the ordinary course of business by a firm wishing to purchase bags. That the plaintiff upon receipt of the letter gave to Morgan the prices of bags, who communicated them in a letter, addressed and mailed by him to S. H. Wilson & Co., Oswego. That afterward, and on the 10th or 11th of September, the plaintiff received through the post-office at Syracuse a letter, mailed at Oswego, as follows:

“OSWEGO, Sept. 10, 1866.

“MR. MILTON PRICE. — *Sir*: We are in want of some bags, and wrote Mr. Morgan, supposing he was in the trade, and he has quoted your prices for stock, etc. Please send us by rail 100 of each, and hope you can make the price a little less, and will be able to give you a larger order soon. Please send bill by mail, and we will remit check for amount of same.

“ (Signed)

S. H. WILSON & CO.”

That on the 13th September, 1866, the plaintiff, with a view of complying with the order, delivered to the defendant at Syracuse three bales of bags, of the value of \$205, directed to S. H. Wilson & Co., Oswego, and the defendant undertook, as a common carrier, to carry the bags to Oswego, and there deliver them to the consignees, and also mailed a bill of the bags to S. H. Wilson & Co., Oswego. That the defendant carried the bags to Oswego the same day, and soon after their arrival at Oswego and on the same day, a man called at the office of the defendant there, and asked defendant's agent if three bales of bags, directed to S. H. Wilson & Co., had arrived. He was informed that they had, and he then said they were what he wanted, and offered to and did pay the freight thereon, and they were delivered to him by the agent of the defendant upon signing a receipt therefor in the name of S. H. Wilson & Co., and they were taken away. That the plaintiff did not know any person or firm by the name of S. H. Wilson & Co., and had no information of any such person or firm, except what was contained in their letter to him of September 10th and in the letter to Morgan. In fact, there was no such firm of S. H. Wilson & Co. in business at Oswego or elsewhere, and the letters written in the name of S. H. Wilson & Co. and the order were a part of a scheme on the part of some person or persons to defraud the plaintiff of his property, and no part of the purchase price has been paid, nor has the property been recovered or the person who received the same from the defendant been traced. That the defendant, when said bags were received and delivered, did not know any person or firm by the name of S. H. Wilson & Co., nor did the defendant know the person to whom the bags were delivered, nor did they require any evidence of the identity of the person or of his being connected with the firm of S. H. Wilson & Co. That it was the usual custom of the defendant not to deliver goods to a stranger without his being identified or his satisfying the defendant by papers or otherwise that he was entitled to receive them; and further, that reasonable care and prudence required such precautions to be taken. That the person to whom the bags were delivered by the defendant was the person who wrote the letters signed S. H. Wilson & Co., or his authorized agent to receive said bags in case they should be sent pursuant to the order of September 10th. That there was no evidence from which it could be found whether his name was S. H. Wilson or not. That when the plaintiff sent the bags he supposed that S. H. Wilson & Co. was the name of a firm at Oswego, and when the defendant delivered them at Oswego they had no knowledge of the fraud, and supposed that the person to whom they were delivered was a member of or represented the firm of S. H. Wilson & Co. It is the duty of a carrier to carry the goods to the place of delivery and deliver them to the consignee. When goods are safely conveyed to the place of destination and the consignee is dead, absent or refuses to receive, or is not known and cannot after reasonable diligence be found, the carrier may be discharged from further responsibility as carrier by

placing them in a proper warehouse for and on account of the owner. (*Fisk v. Newton*, 1 Denio, 45.) The responsibility continues as carrier until discharged in the manner above stated. Hence, a delivery to a wrong person, although upon a forged order, will not exonerate the carrier from responsibility. (*Powell v. Myers*, 26 Wend. 591.) In examining the cases, the distinction between the liability of carriers and warehousemen must be kept in mind. The former is responsible as insurer. The latter for proper diligence and care only, in the preservation of the property and its delivery to the true owner. The former must, at their peril, deliver property to the true owner, for if delivery be made to the wrong person, either by an innocent mistake or through fraud of another, they will be responsible, and the wrongful delivery will constitute a conversion. (*McEntee v. The New Jersey Steamboat Co.*, 45 N. Y. 34.) It is of the liability of a warehouseman after the responsibility as carrier had terminated that the chief judge is speaking in the opinion in *Burnell v. The N. Y. Central R. R. Co.* (45 N. Y. 184), where he holds that the defendant was responsible only for due care and diligence. In the present case, the goods were consigned to S. H. Wilson & Co., Oswego. This plainly indicated some person, or rather persons, known by and doing business under that name. But as there was no such firm, and so far as the findings or case show never had been, delivery could not be made to the consignees. Then, as already seen, it became the duty of the carrier to warehouse the goods for the owner. Instead of this, the defendant delivered them to a stranger without making any inquiry as to who or what he was, simply upon his inquiring if such goods for Wilson & Co. had arrived, and upon being informed that they had, saying that he wanted them. If the case had been determined by the referee upon the question whether due care had been used by the defendant, it would have been necessary to determine whether the goods were at the time held as carrier or as bailee of another character, as in the latter case only will the exercise of proper care exonerate from liability for the loss of the property. But as the legal conclusion of the referee shows that the judgment was not based upon any finding upon that question, but upon the legal conclusion of the referee, that the defendant was discharged from liability by having delivered the goods to the person who wrote the letters and orders, or his authorized agent, it is unnecessary to determine whether the defendant at the time held the goods as carrier or warehouseman, because if the legal conclusion is correct, a delivery to this person or his agent would have discharged the defendant in either case, entirely irrespective of the degree of care exercised in making delivery. The entire findings of the referee show that he would have held the defendant liable had the delivery under a like state of facts been made to any other than this person. The opinion of the learned judge, given at the General Term, shows that the judgment was affirmed by that court upon the same ground, and that the case would have been differently decided had the delivery been

made to some other person. Indeed, this is the only reason that can with any plausibility be given for the judgment. As a finding, that proper care had been exercised by a bailee of goods whose duty it was to keep them for the owner, when he had delivered them to an entire stranger who claimed to be the owner, and gave no evidence of his right except to make inquiry if they had arrived for the consignee, and saying that he wanted them, would be wholly unsupported by the evidence. The question is whether the person who wrote the order acquired a right, so far as the defendant was concerned, to a delivery of the goods; in other words, whether as to it he was the consignee. If he was, the conclusion of the referee was correct. In that case, delivery to him discharged the carrier upon the principle that any delivery, valid as to the consignee, is a defence for the carrier as to all persons. It would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods, delivery to him would not protect the carrier any more than if made to any other person. In *The American Express Co. v. Fletcher* (25 Indiana, 492), the facts were that a person claiming to be J. O'Riley presented himself to a telegraph operator, who was also agent of the express company, and presented a dispatch to be forwarded to the plaintiff, signed J. O'Riley, requesting him to send \$1,900, which the operator sent through. That in due time the operator, in his capacity of agent for the express company, received a package purporting to contain valuables, addressed to J. O'Riley, whereupon the same person who had sent the dispatch presented himself and demanded the package, which was delivered to him. It turned out that this person was not J. O'Riley, but a swindler. *Held*, that the express company was liable to the plaintiff for the money. The case is silent as to whether J. O'Riley was a fictitious name, but I infer that it was not, as the plaintiff would not be likely to forward that amount of money to a person unknown to him. It will be seen that this was a much stronger case for the company than is that of the present defendant, so far as care was concerned, for the delivery was made to the person known by the company to be the one who sent the dispatch, while the defendant knew nothing whatever about the letters or order or how the goods came to be forwarded, consigned as they were. But the case directly decides that no right to the package was acquired by the swindler by sending a dispatch therefor in the name of another. If no right is acquired by sending a dispatch in the name of a real person, it is a little difficult to see how any is acquired by writing in the name of a firm having no existence, especially when the facts show, as in the present case, the consignor supposed he was dealing with a substantial business firm, and the consignment showed that it was intended to be made to such a firm.

In *Ward v. The Vermont & Mass. R. R.* one Collins represented to the plaintiff that there was a person of the name of J. F. Roberts residing at Roxbury, Mass., and fraudulently induced the plaintiff to consign goods to him. In fact, no such person resided there. Upon the arrival of the goods, Collins went to a truckman and personated Roberts, and as such sent the truckman for the goods, to whom they^d were delivered by the company. *Held*, that the company was liable to the plaintiff therefor. That, in principle, is like the present case. In this the swindler had in substance represented to the plaintiff that there was a business firm at Oswego wishing to purchase bags, and had fraudulently procured a consignment of bags from the plaintiff to this firm, when in fact there was no such firm. This gave the defendant no right to deliver the goods to any one else. The argument for the defendant is that the plaintiff consigned the goods to S. H. Wilson & Co., and there being no such firm, the person signing the name of the firm to the letter and order was in respect to the goods to be regarded as the firm for the purpose of delivery by the defendant. This is in direct conflict with the intention of the plaintiff, apparent from the consignment. That authorized a delivery to S. H. Wilson & Co., and to no other. There was not a particle of proof that the person who wrote the letter was ever known to any one by that name. The consignment did not therefore authorize a delivery to him. The defendant had no knowledge whatever of the letters, and his writing them furnished no evidence to it of his doing business in that name.

Duff v. Budd (7 Eng. Com. Law, 399) was a case much like the present. The evidence that the person who received the goods was the same stranger who ordered them in a fictitious name, was equally strong as in the present case, yet there is no intimation that by this fraud he acquired any right to the goods or the defendant any authority to deliver them to him, and the plaintiff was held entitled to recover of the carrier therefor. (See also *Birkett v. Willan*, 4 Eng. Com. Law, 540.) *Heugh v. The London Railway Co.* (5 Law Exch. Reports, 51), and *McKean v. Ivor* (6 id. 36), are relied upon by the defendant. In the former, one Nurse, who had been in the employ of a rubber company which had ceased to do business, wrote and sent to the plaintiff an order for goods in the name of the company. The plaintiff forwarded the goods by the defendant, a common carrier, consigned to the company. The defendant tendered the goods at the place where the company had carried on business. The persons in possession refusing to receive, they were taken away by the defendant, who, according to the course of business, wrote a letter addressed to the company, advising of the receipt of the goods and requesting their removal. Nurse thereafter came and presented this letter, with an order for the delivery of the goods, signed in the name of the company by him to the defendant, who thereupon delivered the goods to him. *Held*, that the liability of the defendant as carrier was terminated by the tender, and that whether the defendant had been negligent in the

delivery was a question of fact for the jury. The latter was a case where goods had been sent to a fictitious firm upon a fraudulent order, by the plaintiff, consigned to the firm at 71 George street, Glasgow, that being the address specified in the order by the defendant, a carrier, who upon the arrival of the goods followed the usage universal among carriers at Glasgow, which was to send notice of the arrival of the goods, with a request for their removal. This notice was received by the one giving the order, who indorsed the name of the firm thereon and presented it to and obtained the goods from the defendant. *Held*, that the defendant having delivered the goods according to the universal usage of carriers, had complied with the directions of the consignor, which must be taken as including such usage, and was therefore not liable.

In *Stephenson v. Hart* (4 Bing. 476) it was expressly held that the carrier had no right to make delivery to the writer of the fictitious order. But it is said that the plaintiff intended the goods should be delivered to the writer of the order. Not at all. He did not consign them to the writer of any order, but to Wilson & Co. This is the only evidence of his intention as to the persons to whom delivery should be made. It is further said that it was the plaintiff's negligence in forwarding the goods without ascertaining that there was in fact such a firm. I am unable to see what the defendant had to do with this. Its duty was to deliver to the firm, and if that could not be found, to warehouse and keep for the owner. The same might be said in every case where goods were forwarded to a consignee supposed to be at a particular place, but who in fact was not there. The usage of the defendant cannot avail him in this case. The referee has found just what was done. This accords with the evidence, in which there was no conflict.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All concur, except CHURCH, Ch. J., dissenting, and ALLEN, J., not voting.¹ *Judgment reversed.*

SAMUEL v. CHENEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1883.

[135 *Mass.* 278.]

MORTON, C. J. The principal facts in this case, regarded in the light most favorable to the plaintiff, are as follows:

In June, 1881, a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff asking for a price list of cigars, and

¹ *Acc.* *Southern Ex. Co. v. Van Meter*, 17 Fla. 783; *Louisville & N. R. R. v. Fort Wayne Elec. Co.*, 108 Ky. 113; *Oskamp v. Southern Exp. Co.*, 61 Oh. S. 341; *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *Winslow v. Vermont & M. R. R.*, 42 Vt. 700. See *Sword v. Young*, 89 Tenn. 126. — ED.

giving his address as "A. Swannick, P. O. box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter ordering a quantity of cigars. The plaintiff forwarded the cigars by the defendant, who is a common carrier, and at the same time sent a letter to the swindler addressed "A. Swannick, Esq., P. O. box 1595, Saratoga Springs, N. Y.," notifying him that he had so forwarded the goods.

There was at the time in Saratoga Springs a reputable dealer in groceries, liquors and cigars named Arthur Swannick, who had his shop at the corner of Ash Street and Franklin Street, and who issued his cards and held out his name on his signs and otherwise as "A. Swannick." He was in good credit, and was so reported in the books of E. Russell and Company, a well-known mercantile agency, of whom the plaintiff made inquiries before sending the goods. No other A. Swannick appeared in the Saratoga Directory for 1881, or was known to said mercantile agency. But in June, 1881, a man hired a shop at No. 16 Congress Street, Saratoga Springs, under the name of A. Swannick, and also hired a box, numbered 1595, in the post-office, and used printed letter-heads with his name printed as "A. Swannick, P. O. box 1595." This man wrote the letters to the plaintiff above spoken of, and received the answers sent by the plaintiff. He soon after disappeared.

The plaintiff supposed that the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods by the defendant, the packages being directed "A. Swannick, Saratoga Springs, N. Y."

The defendant carried the packages safely to Saratoga Springs. On July 1, the defendant, by his agent, carried a package of cigars directed to A. Swannick to the said Arthur Swannick, who refused to receive it on the ground that he had ordered no cigars. Afterwards, on the arrival of the packages, the value of which is sought to be recovered in this suit, the defendant carried the same to the shop No. 16 Congress Street, and delivered them to the person appearing to be the occupant of the shop, and took receipts signed by him as "A. Swannick."

We assume that his real name was not A. Swannick, but that he fraudulently assumed this name in Saratoga Springs and in his dealings with the plaintiff.

The question whether, under these circumstances, the property in the goods passed to the swindler, so that a *bona fide* purchaser could hold them against the plaintiff, is one not free from difficulty, and upon which there are conflicting decisions. The recent case of *Cundy v. Lindsay*, 3 App. Cas. 459, is similar to the case at bar in many of its features; and it was there held that there was no sale, that the property did not pass to the swindler, and therefore that the plaintiffs could recover its value of an innocent purchaser. That this case is very near the line is shown by the fact that such eminent judges as

Blackburn and Mellor differed from the final decision of the House of Lords. *Lindsay v. Cundy*, 1 Q. B. D. 348.

But it is not necessary to decide this question, because the liability of the defendant as a common carrier does not necessarily turn upon it. The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A., and by mistake directs them to B., the carrier's duty is performed if he delivers them to B., although the unexpressed intention of the forwarder was that they should be delivered to A.

If, at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an impostor, who by fraud induced the plaintiff to send the goods to him. *Dunbar v. Boston & Providence Railroad*, 110 Mass. 26. The fact that there were two bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods.

Suppose, upon the arrival of the goods in Saratoga Springs, the impostor had appeared and claimed them; to the demand of the defendant upon him to show that he was the man to whom they were sent, he replies, "True, there is another A. Swannick here, but he has nothing to do with this matter; I am the one who ordered and purchased the goods; here is the bill of the goods, and here is the letter notifying me of their consignment to me, addressed to me at my P. O. box 1595." The defendant would be justified in delivering the goods to him, whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them. It is true the defendant did not make these inquiries in detail; but if, by a rapid judgment, often necessary in carrying on a large business, he became correctly satisfied that the man to whom he made the delivery was the man to whom the plaintiff sent the goods, his rights and liabilities are the same as if he had pursued the inquiry more minutely.

The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is, that he intended to send them to the man who ordered and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff's claim, may well say, we have delivered the goods entrusted to us according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence.

The case at bar is in some respects similar to the case of *M'Kean v. M'Ivor*, L. R. 6 Ex. 36. There the plaintiffs, induced by a fictitious

order sent to them by one Heddell, an agent of theirs to procure orders, sent goods by the defendants, who were carriers, addressed to "C. Tait & Co., 71 George Street, Glasgow." There was no such firm as C. Tait & Co., but Heddell had made arrangements to receive the goods at No. 71 George Street. Upon the arrival of the goods, the defendants, in the usual course of business, sent a notice to 71 George Street for the consignee to call for the goods, the notice saying that it ought to be indorsed so as to operate as a delivery order. Heddell indorsed the notice in the name of "C. Tait & Co.," and sent it to the defendants by a carter, to whom the goods were delivered. It was held that the defendants were not liable, upon the ground that no negligence was shown, and that, having delivered the goods according to the directions of the plaintiff, they had performed their duty; and the fact that they delivered to some person to whom the plaintiff did not intend delivery to be made, was not sufficient to make them liable for a conversion. See *Heugh v. London & North Western Railroad*, L. R. 5 Ex. 51; *Clough v. London & North Western Railroad*, L. R. 7 Ex. 26.

The cases of *Winslow v. Vermont & Massachusetts Railroad*, 42 Vt. 700, *American Express Co. v. Fletcher*, 25 Ind. 492, and *Price v. Oswego & Syracuse Railway*, 50 N. Y. 213, differ widely in their facts from the case at bar, and are distinguishable from it.

Upon the facts of this case, we are of opinion that the defendant is not liable, in the absence of any proof of negligence; and therefore that the rulings at the trial were sufficiently favorable to the plaintiff.¹

*Exceptions overruled.*²

¹ The plaintiff requested the judge to rule that on the facts, which were undisputed and agreed, he was entitled to a verdict. The judge refused so to rule. The plaintiff then requested the judge to rule that, if the jury believed that in shipping these goods the plaintiff intended as the consignee A. Swannick, the person who was well rated in the commercial agency books, and that that intent was properly expressed in the address on the packages, and that the name of the person to whom delivery was in fact made was not A. Swannick, they must find a verdict for the plaintiff. The judge refused so to rule, and instructed the jury that, the intent of the plaintiff being uncommunicated to the defendant, except so far as expressed in the address on the packages, was of itself of no importance, and that if the delivery was made to a person who was known at Saratoga Springs by that name and no other, that was enough, so far as the question of name affected the legal result. The judge then left the single question to the jury, as to whether the defendant acted negligently in making the delivery he did, instructing them further that, although there was no question that there was a misdelivery of the goods in suit, the only question was, whether the defendant was guilty of negligence in making this misdelivery.

² See *Fulton Mills v. Nav. Co.*, 157 Fed. 987. — Ed.

EDMUNDS *v.* MERCHANTS' DESPATCH TRANSPORTATION
COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1883.

[135 *Mass.* 283.]

MORTON, C. J. These three cases were tried together. In some features they resemble the case of *Samuel v. Cheney*, 135 *Mass.* 278. In other material features they differ from it. They also in some respects differ from each other. In two of the cases, a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell.

In *Cundy v. Lindsay*, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages, and who was the person to whom the plaintiffs sent them. *Dunbar v. Boston & Providence Railroad*, 110 *Mass.* 26. The learned judge who tried the cases in the Superior Court based his charge upon a different view of the

law; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner. *Hardman v. Booth*, 32 L. J. (N. S.) Ex. 105. *Kingsford v. Merry*, 26 L. J. (N. S.) Ex. 83. *Barker v. Dinsmore*, 72 Penn. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it. *Exceptions sustained.*

McCULLOCH v. McDONALD.

SUPREME COURT OF INDIANA, 1883.

[91 *Ind.* 240.]

BEST, C. The appellees, who do business under the firm name of "McDonald & Co.," brought this action against the appellant before a justice of the peace, where they recovered judgment. Upon appeal to the circuit court, the cause was tried and judgment again rendered for the appellees for \$171. A motion for a new trial, for the alleged reasons that the verdict was not sustained by sufficient evidence, and was contrary to law, was overruled, and this ruling is assigned as error.

The appellant was a common carrier engaged in transporting merchandise by teams between the city of New Albany, Indiana, and the city of Louisville, Kentucky, and on the 22d day of March, 1881, the appellees shipped by him thirty barrels of flour, of the value of \$171, to Edward Klein in Louisville, Kentucky, which was never delivered to the consignee, but was delivered to I. Kling, and was wholly lost to the appellees. These facts, which are undisputed, rendered the appellant *prima facie* liable for the loss. This is not disputed, but the

appellant claims that his failure to deliver the goods to the proper person was caused by the failure of the appellees to give proper direction for the delivery, and that in consequence thereof he is exonerated from liability.

At the time these goods were shipped the appellees furnished the teamster of appellant with a dray or wagon ticket in these words:

NEW ALBANY, IND., March 22, 1881.

"Received of McDonald & Co., by E. Cline, Louisville, per McCall wagon, 30 bbls. 15 N. P., 15 bey flour," as was the custom, and this ticket, upon the delivery of the flour, was to be signed by the consignee and was to be returned to the consignor. In addition to this, a bill of the flour was made to E. Cline, placed in a sealed envelope and directed "E. Cline, Louisville, Ky." Upon the right hand corner of the envelope, the words "Walnut and Jackson" were written. The envelope was then given to the teamster, to be by him delivered with the flour. I. Kling was doing business as a baker at the intersection of Walnut and Jackson streets in Louisville, and Edward Klein about four squares distant upon the corner of Campbell and Walnut. The appellant had transported a load of flour at a previous time by another teamster for appellees, and delivered it to Edward Klein, but the driver of this team was unacquainted with his place of business and took this flour to the corner of Walnut and Jackson streets, and being unable to find E. Klein, delivered it to I. Kling, who signed his name to the ticket, which was returned to the appellant and by him retained until the 3d day of May, when he returned it with others to one of the appellees, who then paid him his charges for the transportation of the flour.

These facts are undisputed, and upon them we think the appellant clearly liable for the loss of the flour. The only semblance of an excuse for his failure to deliver the flour is the fact that the words "Walnut and Jackson" were written upon the envelope, and if this fact misled him as to the place of business of Klein, it in no manner justified him in delivering the flour to another person. The flour was directed to E. Cline, and delivered to I. Kling. The names are unlike, and in this respect the directions were explicit and not misleading. The appellant could not have mistaken the one for the other by reason of any similiarity in the names, and the fact that the place of business was misstated did not authorize him to deliver the goods to any other person who might be engaged in business at that point. He was bound to deliver the flour to the consignee or retain it. Nor was he justified in assuming that the appellees had misdirected the flour. In delivering it upon such assumption, he acted at his peril, and must bear the loss. In addition to all this, the evidence tends strongly to show that he was not misled by the instructions, but that he was informed before the delivery of the flour that it was probably not intended for I. Kling. Kling testified that when the flour was brought to him he informed the

driver that he had not ordered it, and that it was probably not intended for him; that he would take it, sign his own name to the ticket, and would not use it for a few days, so that if it was not intended for him the driver could return and get it if there was any mistake about the delivery. In this he was fully supported by his son. This testimony, if believed, completely destroyed every semblance of an excuse for the delivery of the flour to L. Kling, and as the appellant, in the absence of an excuse, was liable, the motion for a new trial was properly overruled. The judgment should be affirmed.

SINGER v. MERCHANTS' DESPATCH TRANSPORTATION CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1906.

[191 Mass. 449.]

LORING, J. The contract of the defendant in the case at bar was to deliver the cases in question to L. Singer, Springfield, Illinois, without requiring the production of a receipt or bill of lading.

By accepting the receipt, which states the conditions upon which the property is received, the plaintiff accepted those terms as part of the contract. *Grace v. Adams*, 100 Mass. 505. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553. The receipt in question states on its face that these conditions are to be found on the back. Such a receipt comes within that rule. See in this connection *Pemberton Co. v. New York Central Railroad*, 104 Mass. 144; *Doyle v. Fitchburg Railroad*, 166 Mass. 492. By force of this contract between the parties the case at bar is brought within the rule applied on proof of custom in *Forbes v. Boston & Lowell Railroad*, 133 Mass. 154.

The defendant performed this contract by delivering the goods to L. Singer, Springfield, Illinois.

Whether the consignor in the case at bar meant L. Singer of Boston, Massachusetts, or L. Singer of Springfield, Illinois, is not material. What a consignor in fact means if not communicated to the carrier is not material. The rights of the parties depend upon what is communicated to the carrier. *Samuel v. Cheney*, 135 Mass. 278. The carrier in making delivery is bound to follow that direction whatever it may mean under all the circumstances of the case.

It is agreed that the Lena Singer to whom the goods were delivered was before and at the time in question doing business in Springfield, Illinois, under the name of L. Singer, and was so known to the defendant's representatives in Springfield; also that she had been receiving goods over the defendant's line "nearly every week, addressed to L. Singer," and that "these cases were marked and billed in the same

manner as other goods received at Springfield for said Lena Singer." It does not appear that there was any other L. Singer in Springfield.

Under these circumstances we see no ground for saying that the defendant did not follow the instructions given to him in delivering the goods to Lena Singer.

We cannot accede to the plaintiff's argument that because the defendant's agent in Boston had notice of the name of the consignor and consignee being the same he had notice that the goods were to be delivered to the consignor and therefore that L. Singer, Springfield, Illinois, meant L. Singer of Boston. If any inference ought to have been drawn from this fact we think it was that L. Singer of Springfield was the consignor acting through an agent in making the consignment.

Neither is it material that "the plaintiff had been doing business in Boston for eleven years, and had been sending goods to Springfield, Illinois, for about five years previous to November 21, 1900, about six or seven times a year to the same Guralnik, and had always sent his goods addressed in the same way, namely, L. Singer, Springfield, Ill., and through the defendant company, and he never had any trouble before this time." The defendant's agent in Springfield was not bound to remember and was not chargeable with knowledge of these facts. See in this connection *Raphael v. Bank of England*, 17 C. B. 161; *Vermilye v. Adams Express Co.*, 21 Wall. 138; *Seybel v. National Currency Bank*, 54 N. Y. 288, where it is held that previous notice of loss to a subsequent purchaser of a negotiable security does not charge him with knowledge of the facts stated in the notice. Whether this is the law in Massachusetts was left open in *Hinckley v. Union Pacific Railroad*, 129 Mass. 52, 59.

The issues of negligence on the part of the plaintiff and on the part of the defendant, on which the judge below tried the case, were not the issues on which the rights of the parties in the case at bar depend. Where the instructions as to delivery are doubtful under the circumstances known to the carrier, he is put on his inquiry, and the question of negligence arises. But the instructions here were not doubtful under the circumstances known to the defendant. The judge in the court below apparently acted on *Samuel v. Cheney*, 135 Mass. 278. There was ground for arguing that the instructions there were doubtful under the circumstances known to the carrier. It is to be observed that the charge to the jury in that case was held to have been "sufficiently favorable to the plaintiff"; it was not held to have been correct.

The conclusion to which we have come is supported by *Dunbar v. Boston & Providence Railroad*, 110 Mass. 26; *Samuel v. Cheney*, 135 Mass. 278; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *Stimson v. Jackson*, 58 N. H. 138; *Conley v. Canadian Pacific Railway*, 32 Ont. 258; *The Drew*, 15 Fed. Rep. 826; *Nebraska Meal Mills v. St. Louis Southwestern Railway*, 64 Ark. 169.

The plaintiff evidently intended to make the goods shipped security for his draft to the unpaid balance of the purchase money due him. To do that he should have had the goods billed to his own order and then indorse the bill of lading to the bank discounting his draft. By mistake he billed the goods "straight" and is now seeking to make the defendant liable for his own blunder.

In the opinion of a majority of the court the entry must be

Exceptions sustained.

RICE v. BOSTON AND WORCESTER RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[98 Mass. 212.]

TORT alleging that the defendants as common carriers transported a quantity of assorted coal from Boston to Needham to be there delivered to the plaintiff as consignee and owner thereof, and, at Needham, without giving him due notice, or waiting a reasonable time for him to receive the coal and remove it, "negligently unloaded said coal immediately upon the arrival of the same, greatly injuring said coal and mixing the same with the soil and different kinds, thereby rendering the same unsalable, and making the plaintiff undue and great expense in removing the same."

Trial in the superior court, before MORTON, J., without a jury, when it appeared that the defendants were transporting from Boston to Needham two cargoes belonging to the plaintiff, comprising three hundred and fifty tons of different sorts and sizes of coal, and, on August 12, 1866, dispatched from Boston some car-loads of this freight; that, on their arrival at Needham, notice was given to the plaintiff, who at once set a gang of men to work removing them to his coal-shed; that, on August 15, while the plaintiff's gang was thus engaged, the defendants dispatched from Boston the remainder of the coal, accompanied by laborers, who, immediately on the arrival of the train at Needham, unloaded the cars by the side of the track, without preparing the ground to receive the coal by laying down boards or otherwise, and thereby the different sorts and sizes of coal were mixed and soil was mingled with it; that no notice was given to the plaintiff of the arrival of this part of the coal; and that there was no depot at Needham where it could have been placed under cover.

The defendants asked the judge to rule, 1. that they were not liable as common carriers after the arrival of the cars at Needham; 2. nor under obligation to give the plaintiff notice of the arrival of the coal before unloading; 3. nor liable on the plaintiff's declaration for any injury arising from the character of the place where they deposited the coal.

But the judge declined to make these rulings, and ruled "that the

defendants were liable for the want of reasonable and ordinary care in unloading the coal after its arrival, and that, if no notice was given the plaintiff of the arrival of the coal, they must unload it in a proper place, and with reasonable and ordinary care." And the judge found "that it was not reasonable care to unload it upon the ground where this coal was unloaded, and where it was mixed with the mud and soil, and where the different kinds and sizes were mixed together." The defendants alleged exceptions.

BIGELOW, C. J. The rulings were clearly right. The only objection now urged to them is, that it should have been held that the defendants were not liable as common carriers after the arrival of the cars at the place where the coal was to be delivered. But the position is untenable. The contract of a common carrier includes not only the transportation of merchandise to a particular point, but also its delivery there to the consignee, or the putting it into a suitable place where it can be received by him. A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. Until this is done, the duty and responsibility which attach to a corporation as carriers do not close. *Thomas v. Boston & Providence Railroad Co.*, 10 Met. 472, 477. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, 272. In the latter case, on which the defendants' counsel seems to rely, it is expressly stated that goods must not only be safely carried, but also be discharged on the platform of a depot, or put into a place of safety.

It was a clear breach of the duty of the defendants in this case to unload the coal in an unsuitable place, where it could not be taken away without being mingled with foreign substances, or to unload it in such manner that different sizes and kinds were mixed together so as to render it unsalable. The allegations in the declaration sufficiently set out this breach, and the plaintiff is entitled to recover under them the damages assessed by the court. *Exceptions overruled.*

HUNGERFORD v. WINNEBAGO TUG BOAT AND TRANSPORTATION CO.

SUPREME COURT OF WISCONSIN, 1873.

[33 Wis. 303.]

DIXON, C. J. The testimony tended conclusively to show that during all the time the plaintiff's raft remained tied up at Tarbell's Bay, and until it was with others taken by Mihill's boat and towed to Fond du Lac, it was in the middle of a fleet of logs composed of a large number of rafts belonging to other persons, and which fleet had been brought down the river by the defendant company's boat and tied up at the bay. The raft of the plaintiff was a part of the fleet towed down

by the company. It was in the midst of the fleet, surrounded by other rafts, and inaccessible to the plaintiff, and so continued until the fleet was taken and removed to Fond du Lac. The plaintiff, by himself and his agent, had made different applications to the superintendent of the company to have the raft delivered to him before the removal of the fleet to Fond du Lac, and such delivery had been denied or excused on the ground of the inconvenience and danger of separating the fleet so as to take the raft out. The superintendent testified that on one of those occasions he promised the plaintiff that he would separate and deliver the raft when he moved the fleet, as he at that time expected to do. He also testified that he told the plaintiff that he would prefer that neither the plaintiff nor his agent should go there and take out the raft.

In view of this evidence, and of the undisputed fact that the raft was at all times inaccessible to the plaintiff, and was so kept and retained by the defendant for its benefit and convenience, we are satisfied that the court erred in its instructions, and misled the jury upon the question of what would constitute a good delivery of the logs to the plaintiff. The court charged that the delivery was good, if the logs were securely tied up at the place of destination, and notice thereof given to the plaintiff. The court omitted the most important inquiry raised by the testimony, which was that of *accessibility*, or whether the delivery was such that the plaintiff could receive and take away the logs according to the custom among owners of that kind of property which had been so transported. It cannot be true, as it seems to us, of bulky articles, any more than of any others, that they can be deemed to have been delivered by the carrier to the consignee before the latter has access to them, or can obtain possession or control of them from the carrier, unless there be some peculiar usage or regulation known and assented to by the consignee, taking the case out of the general rule, and making that a delivery which otherwise clearly would not be. No such usage or regulation was claimed or shown. And especially do we think it is untrue, even of bulky articles, that they can be regarded as delivered when the possession of the carrier and the exclusion of the consignee occur and are continued at the instance of the carrier and for his convenience and advantage. The goods thus remaining in the possession of the carrier, and so situated and held by him that the consignee cannot obtain possession of them as is customary among owners of goods and articles of the kind, cannot be said to have been delivered to the consignee. They are still under the dominion of the carrier, and he is responsible as such for their destruction or loss. The court failed to submit the case upon, or to instruct the jury respecting, this important proposition, clearly involved; and the exception by the plaintiff to the charge was well taken on that ground.

The fifth request to charge made by the plaintiff, as probably also the others respecting the question of delivery, was correct, and should have been given.

LOVELAND v. BURKE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1876.

[120 Mass. 139.]

CONTRACT against a common carrier between Boston and Somerville, to recover the value of a hogshead of molasses.

At the trial in the Superior Court, before *Rockwell, J.*, it appeared that the plaintiffs employed the defendant to transport a hogshead of molasses from Boston to their grocery store in Somerville; that the defendant did transport it in his wagon to Somerville at a point near their store; that the plaintiffs then directed him to unload it to and upon the piazza of the store; that he backed his wagon to within a few feet of the piazza, and skids or wooden supports were then placed from the piazza to the wagon; that then the parties undertook to roll the hogshead from the wagon to the piazza, and, when it was upon the skids between the wagon and piazza, one of the skids broke, which caused the hogshead to fall and its contents to be destroyed. It further appeared that the skids were furnished by the plaintiffs, and that the defendant requested the plaintiffs to furnish them, and that the breaking was attributable to the fact that a piece had been sawed out of the underside of the skid, which broke.

The defendant offered evidence tending to prove that it was the universal and well known custom and usage in Somerville and the suburban cities and towns for grocers to keep and furnish skids, whereon to remove heavy articles from common carriers' wagons to their grocery stores, and for carriers not to furnish skids, and that it was the plaintiffs' duty in this case to furnish skids; also that the skids so furnished appeared to him to be suitable, and that the defect, which caused the accident, was not apparent, and in fact was not seen by him; and requested the judge to instruct the jury, "that if they should find that it was the duty of the plaintiffs to furnish proper skids upon which to receive the hogshead, and that they did furnish skids therefor, which appeared suitable to the defendant, he would not be required to make a critical examination of them, and would not be liable for an accident to said hogshead caused by a defect in them, which he did not see, and which was not ordinarily apparent."

The judge declined to instruct the jury in this form, but did rule and instruct them as follows: "The duty of the defendant was to deliver the hogshead safely on the premises of the plaintiffs, using proper means and instruments. The mere fact (if it is a fact) that the usage is that grocers furnish the skids, does not alter the duty of the defendant to deliver the hogshead on the plaintiffs' premises. The carrier, by that fact, and the other fact that the plaintiffs did furnish the skids at the request of the defendant, was not relieved of further duty after the hogshead passed upon the ends of the skids. He was still bound

to use proper care in the use of proper skids. He had no right to use insufficient skids, although the skids produced at his request were furnished according to usage by the plaintiffs. He, the defendant, was still bound to use proper skids. The plaintiffs were not warrantors that the skids were sufficient to carry the hogshead to the sidewalk on the plaintiffs' premises. If there was a latent defect in the skids, known to the plaintiffs and not known to the defendant, and not observable by ordinary skilful observation before using, the defendant would not be liable. The question as to usage, though of some importance, is not decisive of the case, but the previous considerations must also be regarded. The mere fact that the skids were furnished in compliance with usage by the plaintiffs does not alter the period when the delivery is completed. The period of completed delivery by the carrier is the same, whether the skids are to be furnished by the plaintiffs or by the defendant."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions to the rulings and refusals to rule as requested.

AMES, J. The usage which the defendant attempted to prove was not unreasonable in itself, nor was it in contravention of any rule of law. It was not an attempt to establish, for the purposes of this case, any special or peculiar rule of interpretation of terms, conflicting with their recognized and ordinary legal meaning. It was offered merely to prove, as a matter of fact, that there was an established mode of doing a certain business in the locality where the parties reside, so well known to them as to justify the conclusion, that they both expected and understood that the business, which the defendant undertook to do on this occasion, was to be done in that manner. The defendant, upon receiving the goods for transportation, must be understood to have contracted to deal with them according to the regular, known and ordinary course of his business. *St. John v. Van Santvoord*, 25 Wend. 660. His liability to deliver them to the owner in person could be modified by contract, by general usage, or even by his own particular usage, if understood or known by the other party. *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 18 Vt. 131. The parties may make any agreement they please as to the time, place and manner of delivery, and in the absence of any express contract, the limits of delivery may be determined by a local usage. *Barnes v. Foley*, 5 Burr. 2711. Thus it has been held that a carrier may show a usage to deliver at certain stopping places only. *Gibson v. Culver*, 17 Wend. 305. A usage, so long established, uniform and notorious, as to justify the presumption that both parties knew it, becomes a part of the contract, and may determine when the transit is over, and what is a sufficient delivery. That is to say, the extent of the transit may be matter resting altogether in proof; and the course of business at the place of destination, and the usage of carriers at that place, may be controlling ingredients of the contract itself. *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186.

The ruling given by the court as to the effect of the alleged usage, if proved, did not meet the exigencies of the case. The jury should have been instructed that, if they were satisfied of the existence of a long continued, established and notorious usage for grocers, in that locality, to furnish the planks or wooden supports for unloading at their shops heavy articles from carriers' wagons, and if the damage in this instance was occasioned by defects in the appliances furnished for that purpose by the plaintiffs, especially if those defects were not so manifest that the defendant saw, or with reasonable attention would have seen them, the action could not be maintained. A usage to furnish the skids must mean suitable and proper skids, capable with reasonable use of sustaining the weight of the articles which were to rest upon them.

But, independently of the question of usage, there is another difficulty in the plaintiffs' case which we find to be insurmountable. It may be conceded that the defendant's obligation to transport the goods to their place of destination included an obligation to unload and deliver them safely, and that ordinarily the transit is not at an end until such a delivery is accomplished. But the place and manner of delivery may always be varied with the assent of the owner of the property; and if he interferes to control or direct in the matter, he assumes the responsibility. *Lewis v. Western Railroad*, 11 Met. 509.

In the case at bar, it is expressly found that the plaintiffs, on the arrival of the goods, and at the request of the carrier, furnished the skids upon which he was to roll the hogshead into their warehouse. He certainly had a right to suppose that they knew whether the skids were sufficient to support its weight. His duty was to deliver the article as the plaintiffs should direct. If the plaintiffs themselves took part in the delivery, and furnished the skids to be used in the process of unloading, it was equivalent to a direction to him to unload in that manner, or at least to a consent that he should do so. He is entitled to say that he has delivered the goods to the plaintiffs and in accordance with their directions; and it is little short of a legal solecism to say that he can be held responsible for the latent insufficiency of the unloading apparatus which they voluntarily furnished for his use.

Exceptions sustained.

SOUTH AND NORTH ALABAMA RAILROAD CO. v. WOOD.

SUPREME COURT OF ALABAMA, 1880.

[66 Ala. 167.]

SOMERVILLE, J.¹ . . . In the present case, as shown by the evidence, it was distinctly understood, at the time of the shipment of the corn in controversy, that the South and North Alabama Railroad Company

¹ Part of the opinion only is given. — Ed.

had no agent at "Jemison Station," which was a mere "flag station," to which the car-load of corn was consigned. It was equally well made known, that there was neither agent nor station at "Smith's Mills," where it was agreed that the corn might be delivered. The question presented for our decision is. Did the safe delivery of the car, containing the corn, on the side-track at a station where it was agreed to be received, terminate the liability of the railroad company as a common carrier?

The law does not require of railroad companies the absolute duty to construct or keep warehouses at every station along their route of travel or transportation. They are required only to do the best their means will enable them to do, under existing circumstances, and must act in accordance with the reasonable necessities of their usual business. Red. on Car., § 120. We can see no reason why a railway company, acting as a common carrier, cannot stipulate, by a contract express or implied, that their liability as a carrier shall terminate with the delivery at a particular point, and that they will assume no liability at all, in such case, as warehousemen.

If the consignee is fully advised, at the time of shipment, that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business.

The delivery of the car-load of corn on the side-track at "Smith's Mills" terminated the liability of appellant. It would be unreasonable to require the railroad company to employ a special agent to keep the corn in further custody, unless there was an agreement, express or implied, to do so. When the consignee was informed that there was no agent of the company there, he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment, after such knowledge, was an assent, on the part of the shipper, to the implied conditions. *Wells v. Wilmington, etc., R. R. Co.*, 6 Jones (N. C.), 47.

The case of the Southern Express Co. *v.* Armistead, 50 Ala. 350, is not in conflict with these views. That was a delivery by an express company, which is, ordinarily, required to be a personal delivery. Such companies may, in fact, be justly said "to owe their origin to the modification of the law in regard to the delivery of goods in favor of water carriers and railway companies." Hutch. on Car., § 379. That decision was, furthermore, based on the ground, that the evidence failed to show any contract, express or implied, waiving a personal delivery.

EAST ST. LOUIS CONNECTING RAILWAY CO. *v.* WABASH,
ST. LOUIS AND PACIFIC RAILWAY COMPANY.

SUPREME COURT OF ILLINOIS, 1888.

[123 Ill. 594.]

MULKEY, J. This is an appeal from the Appellate Court for the Fourth District, affirming a judgment of the City Court of East St. Louis, in favor of the Wabash, St. Louis and Pacific Railway Company, against the East St. Louis Connecting Railway Company, for the sum of \$600 and costs of suit. The evidence tends to show that the plaintiff, on the 16th day of December, 1883, delivered to the defendant, in East St. Louis, two flat cars loaded with coal, to be by it carried and delivered to the East St. Louis Glucose Works, in the same place, and to return the empty cars to the plaintiff when they should be unloaded by the glucose company. The cars, with their contents, were properly and in due time delivered to the glucose company, and while in its possession, without any fault or negligence on the part of defendant, were destroyed by fire. Appellee thereupon brought the present action against the appellant, to recover damages for the loss of the cars. The cause was heard before the court without a jury, with the result already stated.

Upon the trial of the cause, the court was asked to hold, among others, the following proposition:

“1. The court is requested to hold, that if the evidence in this case shows that plaintiff delivered the cars in question to defendant, to be delivered to the glucose works, and they were so delivered, and that the glucose works received the cars of defendant and placed them upon an independent track of said works, out of the defendant's reach, and where the defendant could not rescue them from danger, and that while in such place they were accidentally destroyed by fire, plaintiff cannot recover for their loss in this case.”

Which the court declined to do, and this is assigned for error. We think the proposition, under the proofs, announced a correct principle, and should therefore have been held by the court as asked. The evidence shows, or at least tends to show, that the defendant, as its name imports, is what is known as a connecting railway; that its line of road connects it with all the railroads (a dozen or more) coming into East St. Louis, including the plaintiff's; that its business was and is to carry cars containing consignments of grain, merchandise, material, fuel, etc., from the tracks or depots of any or either of these companies to the elevators, factories and other places of business on the tracks or side-tracks of the other roads, and to return the car or cars, after having been unloaded by the consignee, to the proper company. In this case, however, the defendant could not reach the glucose works by its own line of road or that of any of the other companies. Its only means of connection with that establishment was a turn-table connecting defend-

ant's tracks, and a private track of the glucose company extending to its business establishment, a distance of some three hundred feet from the turn-table. The defendant had no interest in or control over the track of the glucose company, and even if it had, it could not, by reason of the location of the track, and manner of its construction, have used it. All the defendant was accustomed to do, and, indeed, all that it could do, with consignments for the glucose company, was to run the cars upon the turn-table, then shove them off upon the private track of that company, and when by it taken to their destination, unloaded and run back to the turn-table, to return them to the consignor.

Assuming these facts to be true, and we must so regard them in passing upon the propriety of the ruling of the court, the question arises, what duties did the law, under the circumstances, imply and impose upon the defendant with respect to the cars in question? We think, when the cars, with their contents, were shoved off the turn-table on to the private track of the glucose company, in conformity with their previous course of business, they had reached their destination, and that consequently the defendant's liability as an insurer of them, ceased. Had the glucose company unloaded and returned them, as it was accustomed to do, the defendant's liability as a common carrier would have commenced anew, and continued until they were delivered to the appellee. This is the view we take of the law of the case, and no additional words by us would probably make it plainer.

It is supposed that the ruling of the lower court finds support in the case of Peoria and Pekin Union Railway Co. v. Chicago, Rock Island and Pacific Railway Co., 109 Ill. 135. We do not think so. It is true, general expressions are to be found in the opinion in that case, which, if considered independently of the facts and circumstances to which they related, possibly give color to this claim. But as has been said time and again by this and other courts, the language of an opinion must always be construed with reference to the facts in the particular case in which the language is used. The difference between the case referred to and the present one is so radical and well-defined that it requires no discussion at our hands. That is sufficiently done in appellant's brief, and anything we might pertinently say upon the subject would necessarily be more or less a repetition of what is there said.

As the case must be reversed for the error indicated, it may be proper to add, in conclusion, that we regard the declaration not only irregular, as being really a count in *assumpsit*, while it purports to follow the writ, which is in *case*, but it is also, in our opinion, substantially defective in not disclosing the real ground of complaint. It seems to have been drawn with a view of covering up rather than making known just wherein the defendant was guilty of a breach of its promise.

The judgments of the courts below are reversed, and the cause remanded to the City Court of East St. Louis for further proceedings in conformity with this opinion.

Judgment reversed.

CHAPTER V.

FAILURE IN UNDERTAKING.

SECTION I. LIABILITY.

BOYCE *v.* ANDERSON.

SUPREME COURT OF THE UNITED STATES, 1829.

[2 *Pet.* 150.]

MARSHALL, C. J. This was an action brought in the court of the United States, for the seventh circuit and district of Kentucky, against the defendants, owners, &c.

There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, "that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes."

That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property?

A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute control over him, that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier, for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in

consequence of his negligence or want of skill; but we have never understood that he is responsible farther.

The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried farther, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them.

The directions given by the court to the jury informed them, that the defendants were responsible for negligence or unskilful conduct, but not otherwise.

Sir William Jones, in his *Treatise on Bailments*, p. 14, says, "When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect." In another place (p. 144) the same author says, "A carrier for hire ought, by the rule, to be responsible only for ordinary neglect; and in the time of Henry VIII., it appears to have been generally holden, that a common carrier was chargeable in case of a loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour."

This rule, as relates to the conveyance of goods, was changed as commerce advanced, from motives of policy. But if the court is right in supposing that the strict rule introduced for general commercial objects does not apply to the conveyance of slaves, the ancient rule "that the carrier is liable only for ordinary neglect," still applies to them.

If the slaves were taken on board the yawl to be conveyed in the steamboat, solely in consequence of their distress, and from motives of humanity alone, no reward, hire or freight being to be paid for their passage, as the first prayer of the plaintiff and the prayer of the defendant suppose, the carrier would certainly be responsible only in a case of gross neglect; and the qualification annexed to this construction was correct.

We think that in the case stated for the instruction of the circuit court, the defendants were responsible for the injury sustained, only in the event of its being caused by the negligence, or the unskilfulness of the defendants or their agents, and that there is no error in the opinion given.

CLARKE v. ROCHESTER AND SYRACUSE RAILROAD.

COURT OF APPEALS, NEW YORK, 1856.

[14 N. Y. 571.]

THE action was brought, in the supreme court, to recover damages for the loss of a horse, by means of the alleged negligence of the defendants as common carriers. On the trial before W. F. Allen, J., at the Oneida circuit, in October, 1853, it appeared that the plaintiffs embarked four horses on one of the defendants' cars, at Rochester, to be carried, for hire, eastward the whole length of the defendants' road, and beyond, and that when the train arrived at Auburn it was found that one of them was dead. This horse had a halter around his head and nose, which was tied to a staple driven into the side of the car. When found, he was lying upon his side, his head still held up by the halter, and blood was running from his nostrils.

On the part of the defence it was shown that one of the plaintiffs was present when the horses were put into the car, and assisted in fastening the one which was killed. It appeared that one of the plaintiffs was allowed, in the bargain for the carriage, a passage for himself on the train which carried the horses, there being a passenger car attached to that train, but that he in fact took passage in a passenger train of the defendants, which started at a later hour, and which passed the cattle train before it reached Auburn. There was evidence, *pro* and *con*, as to whether this car was a suitable one for the transportation of horses, the plaintiffs' witnesses testifying that it was too low, and those of the defendants that it was one of the kind commonly used for carrying horses.

The defendants' counsel moved for a nonsuit, on the ground that the defendants were not responsible for the class of injuries which result, wholly or in part, from the conduct of animals entrusted to them to carry. They also contended that it was the duty of the plaintiff, under the facts proved, to have gone in the train with the horses and to have taken care of them, and that the defendants' duty was limited to transporting the car which contained them in safety. The motion was denied, and the defendants excepted.

The judge left it to the jury to determine whether, by the contract, the plaintiff was to go with the horses and take care of them, stating that in that case the defendants were not responsible. He charged that, if such was not the contract, the defendants were responsible, unless the injury was received by a danger incident to this mode of carriage of this species of property, and which the defendants could not, by the exercise of diligence and care, prevent, or by inevitable accident; that, in the absence of any agreement to the contrary, it was the business of the defendants to provide a person to look after the horses on their passage, if their safety required such oversight. The defendants'

counsel excepted, and there was a verdict for the plaintiffs. The judgment having been affirmed at a general term in the fifth district, the defendants appealed.

DENIO, C. J. The fact that the plaintiff was allowed a passage for himself on the train in which his horses were carried did not prove conclusively, if at all, that he was to attend to their safety during the journey. It may very well be that he desired to be present at the time and place of delivery in order to take care of them there, and that the privilege of taking passage in the same train was allowed him for that purpose. The charge which permitted the jury to find an agreement which would relieve the defendants from the obligation to keep an oversight of the animals was as favorable to them as they could require.

As to the carrier's liability respecting the transportation of this sort of property, several theories have been suggested on the argument and in our consultations upon this case.

The plaintiffs contend for the rule that the carrier is bound to transport in safety and deliver at all events, save only the known cases in which a carrier of ordinary chattels is excused, while the defendants maintain that they are not insurers at all against the class of accidents which arise from the vitality of the freight. We are of opinion that neither of these positions is well taken. A bale of goods or other inanimate chattel may be so stowed as that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not therefore unreasonable in its application to such property. But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss. The reasons stated by Chief Justice Marshall, in pronouncing the judgment of the supreme court of the United States, in *Boyce v. Anderson* (2 Peters, 150), have considerable application to this case. It was there held that the carrier of slaves was not an insurer of their safety, but was liable only for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he has over inanimate matter. Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. *Palmer v. The Grand Junction Railway Company* (4 Mees. & Wels., 749) was the case of an action against a rail-

way company for negligence in carrying horses, by which one was killed and others injured; but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn at all on the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that notice had not been given and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no reason why it should not, in all cases of accident unconnected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire, of animals is bound to exercise, and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and, considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires.

We cannot, therefore, assent to the position of the counsel for either of the parties in this case. The learned judge who tried this case gave to the jury the true principle of liability in such cases. Laying out of view the idea of inevitable accident, which it was not pretended had occurred, he instructed them that the defendants were responsible, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. This accords with our understanding of the law.

There was sufficient evidence of negligence to be submitted to the jury. Besides what was said by the witnesses as to the size of the car, it was quite probable that if a proper watch had been kept the horse would have been saved from strangulation. It was for the jury to say whether prudence did not require that a servant of the defendants should have been stationed in or about the horse-car, so as to observe the conduct and condition of the animals constantly or at short intervals.

We think no error was committed on the trial to the prejudice of the defendants, and that the judgment should be affirmed.

Judgment accordingly.

CAMPBELL v. DULUTH AND NORTHEASTERN
RAILROAD CO.

SUPREME COURT OF MINNESOTA, 1909.

[120 N. W. Rep. 375.]

JAGGARD, J. Plaintiff was injured while riding as a passenger in the caboose of the defendant's mixed train. She had a verdict. The first controversy in this appeal is whether the record contains any evidence tending to show that defendant was a so-called logging road, as distinguished from the ordinary commercial carriers. The question is not clear, because the controversy does not appear to have been satisfactorily litigated. Counsel for plaintiff himself, however, in his own questioning on trial, assumed that defendant was a logging road. In his brief on this appeal he asks: "Is it for this court to license the use of such tracks [as defendant's] when owned or operated by the company primarily for the purpose of carrying its lumber? Is a passenger on such a road to assume risks which he would not on other roads?" We have concluded that the record discloses enough to have made this a question of fact, to be tried by the jury.

The question then arises whether the court was in error in giving a charge which defined the duty of the defendant in the carriage of plaintiff to be that of the ordinary commercial carrier of passengers — "to exercise the highest degree of care, skill, and foresight for the safety of plaintiff which was consistent with the practical operation of its means of transportation." More specifically, the court charged that: "In the carriage of the plaintiff, she assumed such sudden jars and jolts as are common and unavoidable in the starting or running of mixed trains; but she did not assume any risk growing out of any negligence resulting from *the unevenness of the track* or the failure to connect the air brakes on the entire train, nor did she assume the risk of injury by the negligence or want of care of the train crew in charge of the train, nor did she assume the risk of being injured by the breaking of the train in question." (The italics are ours.) The court charged, however, that when a passenger takes passage on a freight or mixed train he assumes all risk reasonably or necessarily incident to being carried by a method which he voluntarily chooses. It denied defendant's elaborate requests to charge, which, while not all verbally accurate or correct, were sufficient to direct the attention of the court before the jury retired to the question whether defendant was to be held to the standard of care by which the negligence of an ordinary commercial carrier of passengers is held.

It is clear on general principles, and it is the law in this state, that the test of care is not whether in degree it should be slight, ordinary, or extreme care, but commensurate care, due care under the circumstances. The adoption of this standard would logically result in the

abolition of degrees of negligence. In a measure this has followed. With respect to carriers, however, the traditional standard appears to have survived. In case of ordinary railroads affording regular passenger service, soliciting such traffic, holding themselves out as able to take care of it, and running through passenger trains of great weight at tremendous speed, commensurate care is regarded as supreme or the highest practical care. The standard care, however, has proper regard to the circumstances; that is to say, "in reference to every particular, the highest degree of care which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirement of the business in all other respects," must be exercised. *Dodge v. Boston Ry. Co.*, 148 Mass. 207, 218, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

It is not accurate to say, as is often said, that certain classes of cases involve a relaxation in the degree of care exacted, or that they constitute exceptions to the general rule requiring supreme care. The degree of care is the same. Certain circumstances are recognized as differentiating the result of its exercise; that is, there are particular situations in which commensurate care does not require of certain carrier service the same tracks, equipment, and operation as is exacted of main trunk lines operating exclusively passenger trains. Thus a passenger on a freight or mixed train "assumes all risks reasonably and necessarily incident to being carried by the method which he voluntarily chooses. What the law does require is everything necessary to the security of passengers consistent with the business of the carrier and the means of conveyance employed; the highest degree of care consistent with the practical operation of such train." *Mitchell, J.*, in *Oviatt v. D. C. Ry. Co.*, 43 Minn. 300, 303, 45 N. W. 436. And see *Rosenbaum v. St. P. & D. Ry. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653; *Schilling v. W. & St. P. Ry. Co.*, 66 Minn. 252, 68 N. W. 1083; *Simonds v. M. & St. L. Ry. Co.*, 87 Minn. 408, 92 N. W. 409; *C. & A. R. R. Co. v. Arnol*, 144 Ill. 261, 270, 33 N. E. 204, 19 L. R. A. 313; *Railway Company v. Sweet*, 57 Ark. 287, 21 S. W. 587; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150 (freight elevator). The trial court recognized this particular rule, but refused to apply the underlying principle to defendant's track.

The same principle also requires that the care to be exercised by carriers of passengers should have due reference to the nature of the road operated, the extent of its passenger traffic, its capacity and fitness to transport passengers, and to like considerations. Thus a person who, while a passenger on a train running upon a branch line of a railroad about ten miles in length, and consisting of freight cars and a combination car in which he is riding, one part of which is designed for passengers and another part for baggage, is injured by such jerking and jolting of the car as is ordinarily incident to a train of this kind, and who is familiar with the nature of the business on this line and the manner of conducting it, cannot maintain an action against

the railroad corporation for his injury. *Olds v. New York Ry. Co.*, 172 Mass. 73, 51 N. E. 450. In *I. & G. N. Ry. Co. v. Copeland*, 60 Tex. 325, 330, it was said: "The liability of a company for negligence will, to a degree, be limited by its capacity and fitness to transport passengers, known to a passenger when he elects to be transported on it. Hence a short line road, doing business and running only mixed trains, is not required to apply all the delicate checks and guards that are in use." "Treating of the subject of the use of certain engines and machinery on short roads like the one under consideration, with comparatively a small amount of business, Mr. Wharton says: 'If I employ a carrier of small means and machinery, knowing what his capacity is, I must take him as I find him. . . . A railroad, doing a small business, in a sparsely populated territory, and running only a few trains, is not required to apply all the delicate checks and guards that are in use. . . . Diligence in all these cases is not the perfection of the ideal road. It is the practical adequacy of the actual road for the particular duty it undertakes.' Wharton on Neg., § 140." And see *Shoemaker v. Kingsbury*, 3 Wall. 369, 20 L. Ed. 432 (construction train); *Wade v. Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255 (in which a logging road was held to have been a private carrier).

The rule applicable to so-called logging roads, in the nature of things, depends largely upon the circumstances of each case. Ordinarily, logging roads in this state are subject to the jurisdiction of the Railroad and Warehouse Commission. Their exact legal status does not, however, determine the criterion of the care which they are required to exercise. There are many such roads, whose business is primarily the carrying of the company's own logs. It is urged, however, that the profitable business of an ordinary commercial railroad is to carry freight. None the less the distinction between the two classes of roads, so far as exercising care is concerned, is obvious and founded in nature. Logging roads carry in a caboose, or even in a passenger coach, their employees and the necessarily limited population of the territory through which they run. Their passenger business is small. Many persons are carried gratuitously. Such roads do not especially solicit passengers, nor do they prepare train schedules, or provide conventional passenger equipment. Usual arrangements for the conveyance or convenience of passengers are generally absent. They do not ordinarily run through passenger trains, nor any trains with great speed, nor do they usually provide convenient way stations. Indeed, they often have not even terminal stations. The equipment bears no resemblance to that of a through trunk line. Their tracks are not intended for rapid transportation, are more or less temporary in structure, and in this country often pass over bogs which can be used only in the winter season, when the cold makes the roadbed solid. They are generally inferior in construction, irregular in course, heavy in grades, and sharp as to curves. If the rule of law as to care to be exercised by common carriers of passengers were inflexible, and such

logging roads were to be required to furnish the same tracks, trains, and equipment generally as are commercial roads, the result would be the judicial prohibition of enterprises of their nature. All that is required of such roads is the exercise of the highest care under the circumstances. The passenger must take such roads as he finds them. A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances. The authorities involving the application of principles of facts most nearly similar tend, although not very clearly, to support this conclusion. *Boisen v. Cobbs & Mitchell*, 147 Mich. 429, 111 N. W. 82; *Demko v. Carbon Hill Co.*, 136 Fed. 162, 69 C. C. A. 74; *Williams v. Northern Lumber Co. (C. C.)*, 113 Fed. 382; *Harvey v. Deep River Logging Co.*, 49 Or. 583, 90 Pac. 501, 12 L. R. A. 131.

It follows that a new trial must be granted. In this view it is unnecessary to anticipate the course of that trial by a discussion of the other points raised, beyond saying that the defendant should have called to the attention of the trial court before the jury retired any improprieties in the charge of the court as to the extent to which a wife could recover for her decreased capacity to labor, and that evidence of customary care among well-equipped, well-operated roads of the same general character was admissible.

Reversed, and new trial ordered.

METCALF v. HESS.

SUPREME COURT OF ILLINOIS. 1852.

[14 Ill. 129.]

TRUMBULL, J. The evidence in this case, under the law as laid down to the jury, would have warranted a verdict either way; consequently, the court committed no error in its refusal to set aside the verdict as contrary to evidence; and the only questions in the case arise upon the instructions.

If innkeepers, like common carriers, assume the responsibility of insurers, and are liable for all losses, except such as happen from inevitable accident, without the intervention of man, or from public enemies, then the law was wrongly given to the jury; but if they are only *prima facie* responsible for a loss occasioned by the death of an animal while in their possession, then the instructions given were substantially correct.

It is a harsh rule which makes a person in any case responsible for a loss which has occurred without any fault of his, and it can only be justified upon grounds of public policy, and in consideration of the numerous opportunities afforded by the nature of his business, for fraudulent combination and clandestine dealing, to the injury of the

owner of the property. The rule ought not to be extended beyond the reason in which it originated. An innkeeper can have no motive to destroy the animal of his guest, and there is not the same reason for holding him responsible at all events for such a loss, as there would be a common carrier, or even an innkeeper for the loss of goods which had disappeared from his possession; because in the latter case, he may have converted the goods to his own use, while in the former, he could gain nothing by the death of the animal. Accordingly, a distinction is made in the law books between the liability of innkeepers and common carriers, particularly for losses occasioned by the death of animals. *Hill v. Owen*, 5 Blackf. 323.

It is laid down in Calye's case, Coke's Rep. part 8, 33: "That the innholder shall not be charged, unless there be default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within his common inn."

This is a leading case upon the liability of innkeepers, and, although there is apparently some conflict in the authorities, yet, Story in his Commentaries on Bailments, sect. 472, states the law on this subject as follows: "Innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics. But he may, if he can, repel this presumption, by showing that there has been no negligence whatsoever; or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable accident, or by superior force."

The cases of *Burgess v. Clements*, 4 M. & S. 306; and of *Dawson v. Chamey*, 5 Adolphus & Ellis, 165, fully sustain the law as laid down by Story.

The authorities all agree that an innkeeper is bound to look to the safe keeping of every person's goods who comes to his inn as a guest, and that in case of loss, negligence is to be imputed to him, unless it affirmatively appear, that the loss is not attributable to any fault or want of care by him or his servants.

In cases where the loss is occasioned by the death of an animal, the requirements of public policy are fully answered by holding the innkeeper *prima facie* liable for the loss, leaving him to exonerate himself, if he can, by showing that the death was in no manner occasioned by a want of proper care and attention on his part.

In this case, the evidence was such as to warrant the jury in finding that the mare came to her death by disease, or from her own viciousness, without any fault on the part of the innkeeper in taking care of her; and under such circumstances, he ought not to be held liable, and such was, in substance, the law as given to the jury.¹

Judgment affirmed.

¹ *Acc. Laird v. Eichold*, 10 Ind. 212; *Woodworth v. Morse*, 18 La. Ann. 156, *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *Cutler v. Bonney*, 30 Mich. 259; *Howth v. Franklin*, 20 Tex 798, *Merritt v. Claghorn*, 23 Vt. 177. And see *Vance v. Throckmorton*, 5 Bush, 41.—ED.

HULETT v. HULETT.

COURT OF APPEALS, NEW YORK, 1865.

[33 N. Y. 571.]

APPEAL from the Supreme Court. The action was for the value of property committed by a guest to the charge of the defendant's testator, an innkeeper in Poughkeepsie, and lost by a fire, which destroyed the barn and stable attached to the inn, on the 26th of July, 1860.

The facts, as admitted by the pleadings and found by the referee, were substantially these:

One Banks, an employee of the plaintiffs, stopped at the Balding House in Poughkeepsie, with his own horses and wagon, and a load of buckskin goods belonging to the plaintiffs. He was received as a guest, and the innkeeper took charge of his property. A fire occurred in the course of the night, which occasioned a loss to Banks and the plaintiffs of \$1,250.50.

It did not appear how the fire originated, and the defendant failed to show that it was not the result of negligence. The referee held that the plaintiffs, in their own right, and as the assignees of Banks, were entitled to the value of the property destroyed.

On appeal to the General Term of the fourth district, the judgment was affirmed, on the ground that the innkeeper is an insurer of the goods of his guest while they remain in his custody. From that decision the defendant appealed.

PORTER, J. An innkeeper is responsible for the safe keeping of property committed to his custody by a guest. He is an insurer against loss, unless caused by the negligence or fraud of the guest, or by the act of God or the public enemy. This liability is recognized in the common law as existing by the ancient custom of the realm; and the judges in *Calye's case* treated the recitals in the special writ for its enforcement, as controlling evidence of the nature and extent of the obligation imposed by law on the innkeeper. (8 Coke, 32; 1 Smith's Lead. Cas., Hare & Wallace's ed., 194, 307.)

This custom, like that in the kindred case of the common carrier, had its origin in considerations of public policy. It was essential to the interests of the realm, that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The safeguards, of which the law gave assurance to the wayfarer, were akin to those which invested each English home with the legal security of a castle. The traveller was peculiarly exposed to depredation and fraud. He was compelled to repose confidence in a host, who was subject to constant temptation, and favored with peculiar opportunities, if he chose to betray his trust. The innkeeper was at liberty to fix his own compensation, and enforce summary payment. His lien, then as now, fastened upon the goods of his guest from the time they came to his custody. The care of the property

was usually committed to servants, over whom the guest had no control, and who had no interest in its preservation, unless their employer was held responsible for its safety. In case of depredation by collusion, or of injury or destruction by neglect, the stranger would of necessity be at every possible disadvantage. He would be without the means either of proving guilt or detecting it. The witnesses to whom he must resort for information, if not accessories to the injury, would ordinarily be in the interest of the innkeeper. The sufferer would be deprived, by the very wrong of which he complained, of the means of remaining to ascertain and enforce his rights, and redress would be well-nigh hopeless, but for the rule of law casting the loss on the party entrusted with the custody of the property, and paid for keeping it safely.

The considerations of public policy in which the rule had its origin, forbid any relaxation of its rigor. The number of travellers was few, when this custom was established for their protection. The growth of commerce, and increased facilities of communication, have so multiplied the class for whose security it was designed, that its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest. The rule is in the highest degree remedial. No public interest would be promoted, by changing the legal effect of the implied contract between the host and the guest, and relieving the former from his common law liability. Innkeepers, like carriers and other insurers, at times find their contracts burdensome; but in the profits they derive from the public, and the privileges accorded to them by the law, they find an ample and liberal compensation. The vocation would be still more profitable, if coupled with new immunities; but we are not at liberty to discard the settled rules of the common law, founded on reasons which still operate in all their original force. Open robbery and violence, it is true, are less frequent as civilization advances; but the devices of fraud multiply with the increase of intelligence, and the temptations which spring from opportunity, keep pace with the growth and diffusion of wealth. The great body of those engaged in this, as in other vocations, are men of character and worth; but the calling is open to all, and the existing rule of protection should therefore be steadily maintained. It extends to every case, and secures the highest vigilance on the part of the innkeeper, by making him responsible for the property of his guest. The traveller is entitled to claim entire security for his goods, as against the landlord, who fixes his own measure of compensation, and holds the property in pledge for the payment of his charges against the owner.

In cases of loss, either the innkeeper or the guest must be the sufferer; and the common law furnishes the solution of the question, on which of them it should properly fall. In the case of *Cross v. Andrews*, the rule was tersely stated by the court. "The defendant, if he will keep an inn, ought, *at his peril*, to keep safely his guests' goods."

(Croke's Eliz. 622.) He must guard them against the incendiary, the burglar and the thief; and he is equally bound to respond for their loss, whether caused by his own negligence, or by the depredations of knaves and marauders, within or without the curtilage.

This doctrine is too well settled in the English courts, to be shaken by the exceptional case on which the appellant relies. (*Calve's case*, 8 Coke, 32; *Cross v. Andrews*, Croke's Eliz. 622; *Richmond v. Smith*, 8 Barnw. & Cress. 803; *Cashill v. Wright*, 37 Eng. Law and Eq. 175.)

In the courts of this State it has always been held that the innkeeper, like the carrier, is, by the common law, an insurer. (*Purvis v. Coleman*, 21 N. Y. 111, 112, 117; *Wells v. Steam Navigation Co.*, 2 Comst. 204, 209; *Gile v. Libby*, 36 Barb. 70, 74; *Ingallsbee v. Wood*, id. 458; *Washburn v. Jones*, 14 id. 193, 195; *McDonald v. Edgerton*, 5 id. 564; *Taylor v. Monnot*, 4 Duer, 117; *Stanton v. Le-land*, 4 E. D. Smith, 94; *Grinnell v. Cook*, 3 Hill, 488; *Piper v. Many*, 21 Wend. 282, 284; *Clute v. Wiggins*, 14 Johns. 175.)

The rule, as recognized by us, is sanctioned by the leading authorities in the other States. (1 Pars. on Cont. 623; 1 Smith's Lead. Cas., Hare & Wallace's ed. 307; *Shaw v. Berry*, 31 Maine, 478; *Sibley v. Aldrich*, 33 N. H. 533; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 427; *Mason v. Thompson*, 9 Pick. 280; *Towson v. Havre de Grace Bank*, 6 Harr. & Johns. 47; *Thickston v. Howard*, 8 Blackf. 535, 537; *Kisten v. Hildebrand*, 9 B. Monr. 72.)

A shade of doubt has, at times, been thrown over the question, by the unguarded language of elementary writers, and especially by the suggestion of Judge STORY, in his treatise on the law of bailments, that the innkeeper could exonerate himself from liability by proving that he was not guilty of actual negligence; and this view seems to have been adopted in two of the Vermont and one of the English cases. (Story on Bailments, sec. 472; *Dawson v. Champney*, 8 Adolphus & Ellis, N. S. 164; *Merrit v. Claghorn*, 23 Vt. 177; *McDaniels v. Robinson*, 28 id. 337.) The doctrine of these cases is opposed to the general current of English and American authority, and evidently had its origin in a misapprehension of the rule as stated by the judges in *Calve's case*. It is true that the liability of the innkeeper, by the custom of the realm, was not unlimited and absolute, and that the loss of the goods of the guest was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled, by proof that the loss was attributable to the negligence or fraud of the guest, or to the act of God or the public enemy. No degree of diligence or vigilance on the part of the innkeeper could absolve him from his common law obligation for the loss of his guest, unless traceable to one of these exceptional causes. (*Shaw v. Berry*, 31 Maine, 478; *Sibley v. Aldrich*, 33 N. H. 533.) The rule is salutary, and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests.

We are of opinion that the judgment should be affirmed, on the ground that the testator was an insurer of the property committed to his charge, and that its loss has not been traced to either of the causes recognized as creating an exception to the general rule of liability.

It is proper to remark, that if the law were otherwise, and the inn-keeper were responsible only for actual negligence, it would not avail the defendant on the appeal papers in the present case, as they come to us from the court below. The findings of the referee are not embodied in the case, as required by the existing practice; and on reference to the record prefixed to the case, it appears that the defendant failed to repel by proof the conceded presumption of negligence. (*Bissell v. Hamlin*, 20 N. Y. 519; *Grant v. Morse*, 22 id. 323.)

The judgment should be affirmed, with costs.

All the judges concurred in the opinion of PORTER, J., except DENIO, Ch. J., who delivered a dissenting opinion, in which BROWN, J., concurred.

Judgment affirmed.¹

JOHNSON v. CHADBOURN FURNACE CO.

SUPREME COURT OF MINNESOTA, 1903.

[89 *Minn.* 310.]

COLLINS, J. The defendant in this action, a corporation, was the proprietor of what was known as the "Hotel Vendome," in the city of Minneapolis. The plaintiff and his wife, residents of Morris, in this State, while on their way to Florida, stopped for a few days at the Vendome making preparations for their journey. They were undoubtedly transients, and were in this building when a fire occurred, February 7, 1902. They lost a quantity of personal property, such as wearing apparel and ornaments, and brought this action to recover the value of the same.

There was a general verdict for defendant, and the jury also answered three questions submitted to them by the court. By these answers they found that the defendant was not guilty of negligence by reason of its failure to remove or cause to be removed the plaintiff's property from the building at the time of the fire. They also found that the plaintiff was not guilty of negligence contributing to the loss by reason of his failure to remove the goods from his room, while the third answer related to the value of the goods. Thereafter the plaintiff, upon a settled case, made a motion for judgment notwithstanding the verdict, or for a new trial. This motion being denied, plaintiff appealed. . . .

¹*Acc.* *Mateer v. Brown*, 1 Cal. 221; *Russell v. Fagan*, 7 Houst. 389; *Shaw v. Berry*, 31 Me. 478; *Mason v. Thompson*, 9 Pick. 280; *Dunbier v. Day*, 12 Neb. 596; *Sibley v. Aldrich*, 33 N. H. 553; *Cunningham v. Bucky*, 42 W. Va. 671; *Jahe v. Cardinal*, 35 Wis. 118. — ED.

2. The second question in this case, of importance, is as to the extent of an innkeeper's liability.¹ That he has been held to a very stringent, unyielding rule in this respect is manifest from an examination of the cases. The policy of the law has been to render him liable to the same extent as a common carrier of goods for hire, although there has been much doubt expressed as to this extraordinary responsibility in some cases. That the law requires of him extraordinary diligence in many respects — such as the care of his guests' baggage or other property which has been confided to his actual custody — there can be no doubt.

In the case of *Lusk v. Belote*, 22 Minn. 468, the common law rule was adopted, and it was held that a landlord is responsible for the loss in his inn of the goods of a traveller who is his guest, except when such loss arises from the negligence of the guest, or the act of God or of the public enemy. There the guest's goods had been stolen from his room. It must be admitted that there has been a strong indisposition upon the part of courts to admit of any relaxation, just or unjust, of this rule, and it has been applied to all classes of public hotels. In *Edwards on Bailments*, § 462, it is stated as a reason for so stringent a rule that it was established in a period when theft and robbery were quite frequent, and innkeepers were thought to have many opportunities, and some temptations, to combine and connive with ruffians and others in the plunder of strangers, and that it has been continued in more modern times on the ground of public utility and convenience. In two cases the reason for the continuance of such a doctrine has been discussed with great vigor, and, under the circumstances there appearing, not improperly. *Hulett v. Swift*, 33 N. Y. 571; *Wilkins v. Earle*, 44 N. Y. 172. But the fact is that, in nearly all of the cases supporting the doctrine of absolute liability, unexplained thefts or losses of property were involved. No distinction was made between goods stolen, and goods destroyed by fire for which the landlord was in no manner responsible. That there might be a well-defined distinction does not seem to have been thought of.

But it must be admitted that the logical consequence of the strict rule is that no discrimination can be made between losses arising from thefts by other guests, or by servants, and those which result from such an entirely distinct cause as an accidental fire. However, in a number of states there has been a departure, and there has been adopted what is called the "rule of *prima facie* liability," and there are also decisions in England to the same effect. The doctrine is thus stated in 16 Am. & Eng. Enc. (2d ed.) 536: "An innkeeper is *prima facie* liable for the loss of goods in his charge, but may discharge himself by showing that it happened by irresistible forces, though not the act of God or a public enemy, or by inevitable accident, or otherwise, without fault or negligence on his part;" a number of cases being

¹ Only so much of the opinion as contains the discussion of this point is given.
—ED.

cited in support thereof. *Cutler v. Bonney*, 30 Mich. 259, and *Merritt c. Claghorn*, 23 Vt. 177, are very strong opinions in support of this rule, and in them the subject is discussed with much force and ability. *Vance c. Throckmorton*, 5 Bush (Ky.), 41, is also a strong case in support of this view. See also cases cited in note to 16 Am. & Eng. Enc. (2d ed.) 538.

Conceding that the rigorous rule before stated was just and necessary in its day, there never was any reason or foundation for it in cases where the loss was occasioned by an accidental fire, for which the landlord was not responsible, and when no negligence in connection therewith could be attributed to him. In the present case the fire originated upon premises not occupied by the defendant, and over which it had no control, although in the same building. From the record, it does not appear that the fire spread into that part of the building occupied by the defendant through its negligence; and, as before stated, the jury found, in answer to a special question, that the defendant was not negligent in any manner which contributed to the loss. With these conflicting rules in respect to the liability of the proprietor of a hotel or inn, we are justified in stating one to govern this case which is more just and sensible than the common law doctrine, before referred to; but we are not quite willing to go to the extent that some of the courts have, and absolve the landlord from all liability in case of loss through thefts if he can show that they were unavoidable accidents, or were otherwise committed without fault or negligence on his part. We do not think that the landlord of a public hotel or inn should in every case of loss be held responsible to the same extent as a common carrier, and that under some circumstances they do not stand upon precisely the same footing. Public policy does not require it, nor is such a doctrine reasonable.

We therefore adopt what is known as the "*prima facie* liability." All losses of property incurred by guests at a public hotel or inn by fire are *prima facie* due to the negligence of the proprietor, but he may discharge or relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part. This doctrine does not infringe upon the common-law rule, which makes him responsible for all thefts from within his house, or unexplained, whether committed by guests, servants, or strangers, upon the general principle that an innkeeper guarantees the good behavior of all who may be under his roof — particularly his servants. The doctrine which we adopt, and which must control this case, is that an action cannot be maintained against a hotel or innkeeper by a guest to recover for property lost by fire which was occasioned by unavoidable casualty or superior force, and without any negligence on the part of the innkeeper or his servants. A landlord is not liable for a loss by fire happening through a cause beyond his control. He must be reasonably diligent under the cir-

cumstances known to exist after the fire breaks out, but it is not necessary that he should be extremely vigilant or cautious.

This rule is more in accordance with our views of justice, and will, we believe, commend itself to all. As before stated, the jury found that there was no negligence on the part of either plaintiff or defendant. If this cause had been properly submitted to the jury, and the jury had been instructed along the lines herein indicated, judgment could properly have been ordered for the defendant, but such was not the case. The trial court was in error not only as to the nature of the establishment kept by the defendant, but it also charged that the burden of proof was upon the plaintiff to show that the defendant was negligent. Such is not the rule, under the doctrine of *prima facie* liability, herein indorsed. . . .

Order reversed and new trial granted.

SANDYS v. FLORENCE.

COMMON PLEAS DIVISION, 1878.

[47 L. J. C. P. 598.]

LINDLEY, J. I shall overrule the demurrer to the statement of claim as now amended, since, in my opinion, the statement as amended shews a cause of action. The facts alleged, which I rely on as sufficient for this, are, that "whilst the plaintiff was using the defendant's hotel as a guest for reward to the defendant, by the negligence of the defendant the ceiling of the room in which the plaintiff then was fell." I pass over the previous allegation that it was the defendant's duty "to keep the said hotel in a secure and proper condition, so as to be safe for persons using the same as guests," because I think that that duty is too widely alleged, and that the defendant's duty is not to insure his guests, but to see only that they do not suffer from want of reasonable and proper care on his part. The plaintiff was using the defendant's hotel as a guest for reward, so that the case is distinguishable from that of *Gautret v. Egerton*, 36 L. J. C. P. 191; L. R. 2 C. P. 371, and is more like the case of a keeper of a shop, the duty of whom, with reference to customers, is pointed out by Willes, J., in delivering the judgment of the Court of Common Pleas in *Indermaur v. Dames*, 36 L. J. C. P. 191; L. R. 2 C. P. 311. "We are to consider," he says, "what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation, express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class, for whether the customer is actually chaffering at the time or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows, or ought to know, such as a trap-door left open, unfenced and unlighted. *The Lancaster Canal Company v. Parnaby*, 3 P. & D. 162; 11 A. & E.

223; 9 L. J. Ex. 338. and *Chapman v. Rothwell*, El. Bl. & El. 168; L. J. Q. B. 315; 4 Jur. (N. S.) 1180, where *Southcote v. Stanley*, 1 H. & N. 247; 25 L. J. Ex. 339. was cited, and the Lord Chief Justice, then Mr. Justice Erle, said, "the distinction is between the case of the visitor—as the plaintiff was in *Southcote v. Stanley*, *supra*—who must take care of himself and a customer who as one of the public is invited for the purposes of the business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself." It appears to me that the distinction there pointed out between a visitor in a private house and a customer in a shop is to be remembered in deciding this case, and that therefore it was the duty of the defendant, who was an hotel-keeper, to take reasonable care of the persons of his guests, so that they should not be injured by anything happening to them through his negligence while they are his guests. That being so, all the rest is merely a matter of verbal criticism on the pleading. It is said on the part of the defendant that what is stated in the statement of claim is not enough to shew a cause of action, and that the statement ought to specify the nature of the defendant's negligence, but whether the ceiling fell by reason of a want of proper care on the part of the defendant, or, as it is alleged, by the defendant's negligence, is really the same thing. So it is also immaterial to allege knowledge on the part of the defendant of the state of the ceiling; the single word "negligence" includes this. In my opinion enough is stated to shew a cause of action, and the demurrer must be overruled; but inasmuch as the statement of claim as originally delivered and demurred to was defective, I think there ought to be no costs.

LEONARD *v.* NEW YORK, ALBANY AND BUFFALO
ELECTRO MAGNETIC TELEGRAPH CO.

COURT OF APPEALS, NEW YORK, 1870.

[41 N. Y. 544.]

HUNT, J.¹ . . . The third objection presents the question, whether a telegraph company is liable as a common carrier, or whether their liability arises only in the want of proper care and attention.

I can find no authority, and can discover no principle upon which to charge such a company with the absolute liability of a common carrier. That liability was founded upon the necessities of the case, real or fancied, and has never been applied to any person or to any occupa-

¹ Only a part of this opinion, discussing the liability of telegraph companies, is given.
—ED.

tion, except those of carriers of goods and innkeepers. The carrier had the exclusive possession and control of the goods, often in secret, away from the supervision of any other person, with opportunity for embezzlement and collusion with evil minded persons, and without means of discovery by the owner. Especially was this so in the ruder stages of civilization, and before the present modes of communication, rapid and easy, were in existence. It was upon this view, early adopted as a rule of safety to the community, that the carrier should always be *prima facie* liable, in case of non-delivery of the goods, and that he should not be excused for any causes, except those occurring by the act of God or of the public enemies, and these were to be shown by himself.

Whether his liability is based upon the contract he makes, or upon his public duty, the telegrapher does not come within any of these principles. He has no property intrusted to his care. He has nothing which he can steal, or which can be taken from him. There is no subject of concealment or conspiracy. He has in his possession nothing which in its nature and of itself, is valuable. It is an idea, a thought, a sentiment, impalpable, invisible, not the subject of theft or sale, and as property, quite destitute of value. He cannot, himself, see or hear, or feel the subject of his charge. He submits an idea to a mysterious agency, which carries it to its destination, and delivers it to one there at hand to receive it. He is bound to conduct the business appertaining to this pursuit, with skill, with care and with attention. He holds himself out as possessing the ability to transmit these communications and he undertakes that he can and will transmit and deliver them with the expected dispatch. There may be circumstances in the nature of the instrumentality employed, and the effects to be produced, which, in a particular case, will prevent the proper accomplishment of the undertaking. A thunder storm, which prevents or renders dangerous the operation of electrical currents or machines; a tempest, which prostrates poles and breaks the wires; or unusual pressure of prior business; the sudden sickness of an operator, or many other causes, might prove a sufficient excuse for the want of a prompt delivery of a message. A message is taken to an office in Buffalo to be sent to the city of New York, a distance of about 500 miles, and is accepted. This acceptance implies that the message is to be sent immediately, or certainly within a few hours. The sender can communicate by letter or go in person, within the space of twelve or fourteen hours, and the object of a telegraphic message is to gain the advantage over the time that would thus elapse. This is understood by all parties, and the sender has the right to rely upon it.

In the present case the referee has found actual negligence or want of care in the defendants' agent at Syracuse. The message, as received at Syracuse from the west, contained an order for 5,000 sacks of salt, a sack containing about fourteen pounds of fine salt. As sent by the defendants' agent, it contained an order for the same number of casks of salt — a cask containing 320 pounds of coarse salt. No excuse is

given for this error, and no explanation, unless it be only that the characters by which these words are designated, nearly resemble each other. No doubt this would furnish a reason why a person ignorant of telegraphic characters or unskilled in their reading, should misunderstand them. Such are not the persons that the defendants are permitted to employ in this business. Those engaged in it profess to understand the hieroglyphics. They have, themselves, invented or adapted them. They are bound, also, to use the machinery which will in the best and safest manner deliver to them the expected messages. Careless reading or ignorant management of the machinery is no excuse; it is simply an aggravation of the offence. The negligence was quite enough to justify the action.

BARTLETT v. WESTERN UNION TELEGRAPH CO.

SUPREME JUDICIAL COURT OF MAINE, 1873.

[62 Me. 209.]

DANFORTH, J. On the twelfth day of July, 1870, the plaintiffs left with the defendants a message to be sent from Gardiner to Chicago, by night, directing the purchase of ten thousand bushels choice No. 2 high-mixed corn. As received by the persons to whom it was addressed, it read one thousand instead of ten thousand bushels.

In consequence of this error a loss ensued, which the plaintiffs claim the defendants are legally liable to make up to them.¹

That the liabilities of a common carrier do not attach to business of this kind may now be considered as well settled. That messages of the highest importance are often sent requiring a proportionate degree of care, may be considered equally certain. To require a degree of care and skill commensurate with the importance of the trust reposed, is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to entrust to this mode of communication, matters of great moment, and therefore the law requires great care. It is necessary to use instruments of a somewhat delicate nature, and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company holding itself out to the public, as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects the

¹ Only so much of the opinion as discusses the liabilities of telegraph companies is given.—ED.

company would undoubtedly be liable for the damage resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of, is insufficient to guard against or avoid.

The question now arises as to whether the plaintiffs have made out their case. They have proved that the message was not correctly transmitted, and from that error damage has resulted. The company undertook to send the message, and of course to send it correctly. The present state of the art is not such as to render error the rule, but rather the exception. We may with great confidence expect that with the ordinary degree of skill and care, mistakes will be avoided. Besides, the company undertook to perform the work, and have failed to do so. Under these circumstances it is sufficient for the plaintiffs to prove the failure. After that, if the defendants would excuse themselves, the burden is upon them to show that the failure was caused by some agency for which they were not responsible. This is in accordance with well settled principles of law as applicable to contracts generally, nor does any hardship result from this rule. The means of proof are almost entirely within the power of the defendants, and equally beyond the reach of the plaintiffs. *Shearman & Redfield on Neg.*, § 559; *Rittenhouse v. The Ind. Line of Tel.*, 44 N. Y. 263; *DeRutte v. Tel. Co.*, *Allen's Tel. Cases*, 284.

In excuse for their non-performance the defendants offered to show "the nature of this business; how it is carried on, and its liability to error and mistake," and other testimony to the same effect. This testimony was rejected, and in this we see no error. It is all consistent with the plaintiffs' theory that there was a want of skill or care, which caused the mistake. The difficulties of the business, its liability to error, or to be affected by the condition of the atmosphere, or that the characters used were such as might easily be mistaken one for the other, or on account of the electrical condition of the atmosphere liable to run into each other, may be suggestions tending to show the necessity of greater care or skill, but the proof, if admitted, would not show, or tend to show, that this error was caused by any of these difficulties, or by any cause for which the company is not liable. There is no suggestion even that it was caused by any of these agencies. In accordance with these views is the well considered case of *Tyler v. Western Union Telegraph Company*, decided in Illinois, and reported in the *Albany Law Journal*, vol. 8, pp. 181 and 337. The rule of damages is settled in *True v. International Telegraph Company*, before cited, in accordance with all the authorities.

PHILADELPHIA & READING RAILROAD CO. v. DERBY.

SUPREME COURT OF THE UNITED STATES, 1852.

[14 *How.* 468.]

GRIER J. This action was brought by Derby, the plaintiff below, to recover damages for an injury suffered on the railroad of the plaintiffs in error. The peculiar facts of the case, involving the questions of law presented for our consideration, are these :

The plaintiff below was himself the president of another railroad company, and a stockholder in this. He was on the road of defendants by invitation of the president of the company, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the company, and paid no fare for his transportation. The injury to his person was caused by coming into collision with a locomotive and tender, in the charge of an agent or servant of the company, which was on the same track, and moving in an opposite direction. Another agent of the company, in the exercise of proper care and caution, had given orders to keep this track clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision.

The instructions given by the court below, at the instance of plaintiff, as well as those requested by the defendant, and refused by the court, taken together, involve but two distinct points, which have been the subject of exception here, and are in substance as follows :

1. The court instructed the jury, that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by defendant's counsel as forming a defence to the action, to wit : that the plaintiff was a stockholder in the company, riding by invitation of the president — paying no fare, and not in the usual passenger cars, &c.

2. That the fact that the engineer having the control of the colliding locomotive, was forbidden to ride on that track at the time, and had acted in disobedience of such orders, was not a defence to the action.

1st. In support of the objections to the first instruction, it is alleged, "that no cause of action can arise to any person by reason of the occurrence of an unintentional injury, while he is receiving or partaking of any of those acts of kindness which spring from mere social relations; and that as there was no contract between the parties, express or implied, the law would raise no duty as between them, for the neglect of which an action can be sustained."

In support of these positions, the cases between innkeeper and guest have been cited, such as 1 Rolle's Abr. 3, where it is said, "If a host

invite one to supper, and the night being far spent, he invites him to stay all night, and the guest be robbed, yet the host shall not be chargeable, because the guest was not a traveller;" and Cayle's case, (4 Rep. 52,) to the same effect, showing that the peculiar liability of an innkeeper arises from the consideration paid for his entertainment of travellers, and does not exist in the case of gratuitous lodging of friends or guests. The case of *Farwell v. The Boston and Worcester Railroad Company* (4 Metcalf, 47) has also been cited, showing that the master is not liable for any injury received by one of his servants, in consequence of the carelessness of another, while both are engaged in the same service.

But we are of opinion, that these cases have no application to the present. The liability of the defendants below, for the negligent and injurious act of their servant, is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveller, by stage coach, or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of "*respondeat superior*," which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him, and injures his property or person, it is no answer to an action against the master for such injury, either, that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life may, in some cases, successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings.

In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover.

It is a fact peculiar to this case, that the defendants, who are liable for the act of their servant coming down the road, are also the carriers who were conveying the plaintiff up the road, and that their servants immediately engaged in transporting the plaintiff were not guilty of any negligence, or in fault for the collision. But we would not have it inferred, from what has been said, that the circumstances alleged in the first point would affect the case, if the negligence which caused the injury had been committed by the agents of the company who were in the immediate care of the engine and car in which the plaintiff rode,

and he was compelled to rely on these counts of his declaration, founded on the duty of the defendant to carry him safely. This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." See *Coggs v. Bernard*, and cases cited in 1 Smith's Leading Cases, 195. It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence: and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference, (if it be capable of definition,) as the verdict has found this to be a case of gross negligence.

When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of "gross."

In this view of the case, also, we think there was no error in the first instruction.¹

PIERCE v. MILWAUKEE AND ST. PAUL RAILWAY CO.

SUPREME COURT OF WISCONSIN, 1868.

[23 Wis. 387.²]

APPEAL from the Circuit Court for La Crosse County.

Action to recover the value of eight bundles of bags, which had been in use for two seasons in transporting grain from Lake City, Minnesota, to Genoa, Wisconsin, by way of the river and the defendant's railway. The complaint alleged that the bags were delivered by the packet company doing business on the river, to the defendant at La Crosse; and that defendant, as a common carrier, received said bags to be safely carried by it over its railway, and delivered at Milwaukee to the plaintiff, "for a reasonable compensation to be paid by the plaintiff therefor." Answer, a general denial. At the trial defendant sought to avoid liability, as a common carrier, for the loss of the bags, by showing a uniform and long-established custom of the river and railway, that all bags used in the transportation of grain on said river or railway were carried free of charge, when empty, claiming that for bags so carried it could be held responsible only in case of gross negligence.

PAINE, J. After carefully considering the original briefs of counsel and the arguments upon the rehearing, I have come to the conclusion that the carrying of the bags of the plaintiff by the company cannot be considered as gratuitous, whether the custom was only to return bags

¹ The remainder of the opinion was concerned with another point. — Ed.

This case is abridged.

free that had gone over the road filled, or whether it was a general custom to carry the bags of customers free both ways, without regard to the question whether, at any particular time, they were returning from a trip on which they had passed over the road, filled or not. If such a relation were created by an express contract, instead of being based upon a custom, it would seem clear that there would be a sufficient consideration for the agreement to carry the bags. If a written contract should be signed by the parties, in which the one should agree to give the company the transportation of his grain at its usual rates, and the company should agree in consideration thereof to carry the grain at those rates, and also to carry the bags both ways whenever the customer might desire it, without any further charge, there can be no doubt that the giving to the company his business, and the payment of the regular freight, would be held to constitute the consideration for this part of the agreement on the part of the company. But if it would be so in such a case, it is equally so when the same understanding is arrived at through the means of a custom. The company, by establishing such a custom, makes the proposition to all persons, that if they will become its customers, it will carry their bags both ways without any other compensation than the freight upon the grain. Persons who become its customers in view of such a custom, do so with that understanding. And the patronage and the freights paid are the consideration for carrying the bags. The company, in making such a proposition, must consider that this additional privilege constitutes an inducement to shippers to give it their freight. And it must expect to derive a sufficient advantage from an increase of business occasioned by such inducement, to compensate it for such transportation of the bags. And it ought not to be allowed, when parties have become its customers with such an understanding, after losing their bags, to shelter itself under the pretext that the carrying of the bags was a mere gratuity, and it is therefore liable only for gross negligence.

It makes no difference that the custom is described as being to carry the bags *free*. In determining whether they are really carried "free" or not, the whole transaction between the parties must be considered. And when this is done, it is found that all that is meant by saying that the empty bags are carried free, is, that the customers pay no other consideration for it than the freight derived from the business they give the company. But this, as already seen, is sufficient to prevent the transportation of the bags from being gratuitous. *Smith v. R. R. Co.*, 24 N. Y. 222; see also *Bissel v. Railroad Co.*, 25 id. 442. It will be seen that in that case a majority of the court held, that where a passenger expressly agreed to take certain risks of injury upon himself, for a consideration, the agreement was valid and binding. But *Denio*, *Wright*, and *Sutherland* dissented, and *Denio, J.*, in his opinion, on pages 455 and 456, states what seems to be the true construction and effect of such a contract, holding that a person riding in charge of cattle, under a contract to carry them at a specified price per car load,

and to carry a person "free" to take charge of them, was not a gratuitous passenger. The other two dissenting justices doubtless agreed with him upon this point. And it is evident from the remarks of Selden, J., on page 447, that he did not hold the opposite view, but rested his decision upon the ground that the plaintiff was bound by the contract to take the risk, whether he was a gratuitous passenger or not. See also *Steamboat New World v. King*, 16 How. (U. S.) 469, in which it was held, that, under a general custom of steamboats to carry "steamboat men" free, a steamboat man, riding on a free ticket, was not to be regarded as a gratuitous passenger; but that the consideration was to be found in those advantages which induced the establishment of the custom—a doctrine which seems directly applicable to the question under consideration.

I can see no ground for any such difficulty as that suggested by the appellant's counsel on the re-argument. He said, if this undertaking to return bags free was to be considered a matter of contract on the part of the company, it would be unable to collect its freights on delivering grain, upon the ground that its contract was not then completed. But this could not be so. The company, on delivering the grain, parts with the possession of the property to the shipper or his consignee. And on doing that, it is of course entitled to its freight. And its agreement to return the bags without further charge, or to carry them free both ways whenever its customer should deliver them empty for that purpose, could not have the effect of destroying this right. The contract would be construed according to the intention of the parties. See Angell on Carriers, § 399, note 3, and cases cited. And here it would be very obvious that neither of the parties contemplated any relinquishment by the company of its right to freight on delivering the grain. The transaction for that purpose would be distinct. Here the defendant's evidence showed that the plaintiff was a "customer." The company claims that he had complied with the custom on his part, so as to make it applicable to him. But if he had done so, as that constitutes a sufficient consideration to prevent the carrying of his bags from being gratuitous, the company is liable.

It is immaterial, therefore, whether the instruction excepted to was strictly accurate or not, in assuming that there was evidence tending to show that the bags were on a return trip, after having gone over the road filled; as neither in that case, nor on the custom as claimed to have been shown by the appellant, would the transportation be gratuitous.

By THE COURT. The judgment is affirmed, with costs.¹

¹ Compare: *Knox v. Rues*, 14 Ala. 249; *Chouteau v. Anthony*, 20 Mo. 549; *Pender v. Robbins*, 6 Jones L. 207; *Spears v. Lake Shore R. R.*, 67 Barb. 513; *Dudley v. Ferry Co.*, 42 N. J. L. 25.—ED.

SECTION II. LIMITATION OF LIABILITY.

MAYHEW *v.* EAMES.

KING'S BENCH, 1825.

[3 B. & C. 601.]

THIS was an action against the defendants, as carriers, brought to recover the value of a parcel of country bank notes sent by their coach from Downham, in the county of Norfolk, to London. At the trial before ABBOTT, C. J., at the London sittings after last term, the following appeared to be the facts of the case. The plaintiffs were silk ware-housemen, residing in London, and employed one Hughes as their agent to collect their debts in the country. The defendants were coach proprietors and owners of a coach running from Lynn to the White Horse, Fetter Lane, London. On the 10th of February, 1824, Hughes, the agent of the plaintiffs, having collected, in payment of debts due to them, provincial banker's notes to the amount of £87, inclosed them in a parcel, and upon the parcel he wrote the word "Mourning," and addressed it to the plaintiffs, "Foster Lane, Cheapside, London." Hughes then delivered the parcel to one Wright, at whose house in Downham the coach stopped to change horses, and he paid for the carriage 1s. 2d., and Wright gave him a receipt for the parcel. When the coach arrived, Wright delivered the parcel to the coachman, and it was afterwards lost. For the defendant it was proved, that the plaintiffs had frequently received parcels before the 10th of February coming by coaches to the White Horse, Fetter Lane, London, and the porter who delivered such parcels proved that he had always delivered with them a ticket containing the amount of the charge for carriage and portage, and a printed notice, "that the proprietors of carriages which set out from that office would not hold themselves accountable for any passenger's luggage, truss, parcel, or any package whatever above the value of £5 if lost or damaged, unless the same were entered as such and paid for accordingly when delivered there, or to their agents in town or country; nor would they be accountable for any glass, china, plate, watches, writings, cash, bank notes, or jewels of any description, however small the value." But there was no evidence to show that Hughes had any knowledge of such notice at the time when he delivered the parcel to Wright. Upon this evidence the Lord Chief Justice was of opinion that as the plaintiffs knew that the defendants were not accountable for bank notes, they ought to have desired their agent not to send parcels of that description by any coach of the defendants, and the plaintiffs were nonsuited, with liberty to them to move to enter a verdict for £87.

PER CURIAM. At common law, carriers are responsible for the value of the goods they undertake to carry, but they may limit their responsibility by making a special contract, and that is usually done by giving public notice that they will not be accountable for parcels of a given description. In order, however, to show in any particular case that they are not subject to the common-law responsibility, they must prove that the party sending the goods had knowledge of the notice. But the knowledge of the principal is the knowledge of the agent. Now here the agent was employed to transmit bank notes, which are the subject of the present action, and it appears that the plaintiffs themselves had knowledge that the defendants would not be responsible for bank notes, because it is in evidence that many parcels came to them from the defendants, and that the porter delivered together with such parcels a printed paper containing a notice that "the proprietors of carriages setting out from the White Horse, Fetter Lane, would not hold themselves accountable for any glass, china, plate, watches, writings, cash, bank notes, or jewels of any description, however small the value." Now when a parcel came to the plaintiffs in this way before, they must have seen the notice, because it was contained in the same paper which they must have looked at in order to ascertain the amount of the charge for carriage and portage which they had to pay. Then if the plaintiffs knew that parcels would not be accounted for if they contained bank notes, it was their duty to tell their agent not to send any such parcels by any of the coaches coming to the White Horse, Fetter Lane. But as the plaintiffs suffered their agent to send notes by those coaches, we think that knowledge of the notice having been brought home to the plaintiffs, the carrier is thereby protected from such loss, although the parcel was sent by an agent.

*Rule refused.*¹

CARRIERS' ACT, 11 GEO. IV. & 1 WIL. IV., c. 68.

§ 1. . . . No mail contractor, stage-coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following . . . contained in any parcel or package . . . when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof . . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering

¹ "The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27, which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shown on the record; it only arises in defence of the carrier, and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into *Westminster Hall*." BORROUGH, J., in *Smith v. Horne*, 8 Taunt. 144 (1818). — ED.

the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

§ 4. . . . No public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in any wise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractor, stage-coach proprietor, and common carrier as aforesaid shall . . . be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

§ 6. . . . Nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail carrier, stage-coach proprietor, or common carrier and any other parties, for the conveyance of goods and merchandises.

WALKER v. YORK AND NORTH MIDLAND RAILWAY.

QUEEN'S BENCH, 1853.

[2 E. & B. 750.]

THE cause was first tried before Lord CAMPBELL, C. J., at the sittings in London after last Hilary Term, when a general verdict passed for the plaintiff: but a new trial was granted, in order that it might be ascertained whether a notice hereafter mentioned had been served on the plaintiff or not: the defendants were to admit the rest of the plaintiff's case, and the amount of damages.

On the second trial, before COLERIDGE, J., at the sittings in London during last Trinity Term, the following facts were agreed on by both sides. The plaintiff was a fish merchant at Scarborough. There is railway communication from Scarborough to Manchester and to London. The terminus at Scarborough is part of the defendants' railway, which communicates with other railways leading to Manchester and London. The defendants, as is usual, collect goods at their own terminus and forward them through the connecting lines to their destination; and it was admitted that the fish in question had been sent by defendants' line, and not delivered in due time, to the damage of plaintiff. The learned judge ruled that, after these admissions, made in obedience to the rule granting the new trial, the *onus* lay on the defendants; and their counsel began. The parts of the evidence, material to the question discussed in banc, were as follows:

The defendants had caused a large number of notices to be printed ; of which the following is a copy :

“ York and North Midland Railway. Notice. Fish Traffic. Fish being a perishable and consequently a hazardous article of traffic, The York and North Midland Railway Company hereby give notice that, on and after the 12th April, 1852, they will carry it at the reduced rates at present charged, or which may hereafter be charged, below the rate which the said company is entitled to charge, on the following conditions only. . . .

“ 2. This company is not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any particular market ; nor are they to be required to carry or forward by any particular train, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned. . . .

“ 4. The station clerks and servants of the company have no authority to alter or vary these conditions.”

A clerk, ordinarily employed for defendants at York, who was called for defendants, proved that, on 2d September, 1852, he was sent with a large number of these printed notices to Scarborough ; and at Scarborough received, from the station master there, a list of the fishdealers at Scarborough. He then went down to the sands, where the fishing boats were coming in, and where consequently many of the fishdealers were assembled, and there served as many of them as he could with copies of the notice. Amongst others, he served a person whom he believed to be the plaintiff ; but, as he was not then personally acquainted with the plaintiff, he could not speak very positively to the identity. On cross-examination it appeared that the persons served were very angry ; that many tore up the notices and said that they would not be bound by them ; and that there was considerable disturbance. The station master at Scarborough gave evidence that, on the 3d September, he saw the plaintiff, who said to him : “ What is the use of sending that old fellow to serve these notices ? they are of no use.” The fish, the subject of the first count, were sent off on that same 3d of September. The plaintiff himself, who was called as a witness, denied having been personally served with the notice, and denied having ever consented to be bound by its terms. The learned judge left it to the jury to say whether there was a special contract or not. He told them that the first question was one of fact, whether the plaintiff was served with the notice ; and that, if they were of that opinion, they might infer a special contract. And he advised them to draw that inference from the receipt of the notice and the subsequent sending of the goods, unless, in the interim, the plaintiff had unambiguously refused to deliver the goods on the terms of the notice, and the defendants had acquiesced in that refusal. The jury found that there had been a service of the notice, and that there was a special contract. The verdict was entered for the defendants on the

second and third issues, and the corresponding issues on the pleas to the other counts.

M. Chambers, in last Trinity Term, obtained a rule *nisi* for a new trial, on the ground of misdirection.¹

WIGHTMAN, J. The question is, Whether there was any evidence from which the jury might find a special contract. It is not raised quite in that form; but that is the substantial question. The defendants had served the plaintiff with a notice that, in consideration of their carrying fish at reduced charges, they would require their customers to agree to certain conditions on which, and on which only, they would carry fish; and they also state in the notice that no servant of theirs has power to alter these terms. The question is, Whether the fish in question was received under a contract to carry on these terms. Now the plaintiff did not assent in express words to these conditions: on the contrary, he objected to them; but still, for all that, he sent the goods, knowing that no servant had power to alter the conditions, and that they would be accepted on those conditions only: and I think he must be taken to have sent them on these terms unless there was something in the law to prevent the conditions from binding. Mr. Cowling contends that there is such a law, and that statute 11 Geo. IV. & 1 Wil. IV. c. 68, s. 4, prevents this notice from affecting the liability of the defendants as carriers: but I do not think that such is the effect of the act. It is confined, I think, to public notices, such as were very common before the act; notices addressed to the public at large, raising a question, in every case, whether the notice was brought home to the particular person; I do not think it applicable to a notice specifically delivered to a particular person to form the basis of a special contract with him. The judge told the jury that, if such a notice was specifically delivered to the plaintiff, unless it could be shown that he dissented from those terms, and the defendants acquiesced in his dissent, they ought to infer that the plaintiff, persisting in sending the goods, assented to their being taken on the terms. I think so too. If a man is told that goods will not be received except on certain terms, and notwithstanding this he will send the goods, I think that he must be taken to agree that they shall be taken on these terms. Statute 11 Geo. IV. & 1 Wil. IV. c. 68, s. 6, expressly saves special contracts: and I think Mr. Cowling hardly contended that a special contract might not be proved by a letter sent to an individual addressed to him, and a subsequent delivery of the goods, though, if such a notice is in the shape of a circular, he says it is within section 4. But I think section 4 is limited to public notices, advertised or put up in an office.

¹ The statement of facts has been abridged and arguments of counsel and concurring opinions of Lord CAMPBELL, C. J., and COLERIDGE, J., have been omitted. — ED.

RAILWAY AND CANAL TRAFFIC ACT OF 1854,
17 & 18 VICT. c. 31.

§ 7. EVERY such company as aforesaid [railway and canal companies] shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void; provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say), for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of value so declared. . . . Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage.

RAILROAD *v.* LOCKWOOD.

SUPREME COURT OF THE UNITED STATES, 1873.

[17 Wall. 357.]

ERROR to the Circuit Court for the Southern District of New York; the case being thus:—

Lockwood, a drover, was injured whilst travelling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign

an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

BRADLEY, J.¹ It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely

¹ Part of the opinion is omitted. — Ed.

done, enables the carrying interest to reduce its rates of compensation ; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard ; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void ; or, at least null and void under certain circumstances. . . .

It is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it ; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. The New Jersey Steam Navigation*

Company, 1 Kern. 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer choose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the

conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his custom-

ers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence — an excuse so repugnant to the law of their foundation and to the public good — they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

*Judgment affirmed.*¹

MYNARD v. SYRACUSE, BINGHAMPTON, AND NEW YORK RAILROAD.

COURT OF APPEALS, NEW YORK, 1877.

[71 N. Y. 180.]

CHURCH, C. J.² The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant without the fault of the plaintiff. The defence rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to “release and discharge the said company from all claims, demands, and liabilities of every kind whatsoever for or on account of, or connected with, any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising.”

The question depends upon the construction to be given to this contract, whether the exemption “from whatever cause arising,” should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or wilful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

¹ Compare: *Merch. D. T. Co. v. Cornforth*, 3 Col. 280; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *M. S. & N. I. R. R. v. Heaton*, 37 Ind. 448; *Ketchum v. Amer. M. U. Exp. Co.*, 52 Mo. 390; *Davidson v. Graham*, 2 Oh. St. 131; *L. & N. R. R. v. Gilbert*, 88 Tenn. 430. — ED.

² Part of the opinion is omitted. — ED.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities — one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words from whatever cause arising may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S. R.) 344, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate them from liability for want of ordinary care. Nelson, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this State. In *Alexander v. Greene*, 7 Hill, 533, the stipulation was to tow plaintiff's canal boat from New York to Albany at the risk of the master and owners, and the Court of Errors reversed a judgment of the Supreme Court with but a single dissenting vote, and decided that the language did not include a loss occasioned by the negligence of the defendants or their servants. In one of several opinions delivered by members of the court, it was said, in respect to the claim for immunity for negligence: "To maintain a proposition, so extravagant as this would appear to be, the stipulation of the parties ought to be most clear and explicit, showing that they comprehended in their arrangement the case that actually occurred."

Wells v. Steam Navigation Co., 8 N. Y. 375, expressly approved of the decision of *Alexander v. Greene*, and reiterated the same principle.

Gardiner, J., in speaking of that case said: "We held, then, if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility on account of the gross neglect of himself or his servants, he must show his immunity on the face of his agreement; and that a stipulation so

extraordinary, so contrary to usage and the general understanding of men of business, would not be implied from a general expression to which effect might otherwise be given."

So, in the Steinweg Case, 43 N. Y. 123, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant; and, in the Magnin case, still more recently decided by this court (56 N. Y. 168), the contract with the express company contained the stipulation "and, if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid."

It was held, reversing the judgment below, that the stipulation did not cover a loss accruing through negligence, Johnson, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that he expressly stipulated." In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of Lockwood v. Railroad Co., 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration; but the right thus to stipulate has been so repeatedly affirmed by this court, that the question cannot with propriety be regarded as an open one in this State. 8 N. Y. 375; 11 N. Y. 485; 24 N. Y. 181-196; 25 N. Y. 442; 42 N. Y. 212; 49 N. Y. 263; 51 N. Y. 61.¹

The remedy is with the Legislature, if remedy is needed. But, upon the question involved here, it is correctly stated in that case that "a review of the cases decided by the courts of New York shows that, though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uni-

¹ Compare: Carr v. L. & Y. Ry., 7 Ex. 707; McCawley v. Furness Ry., L. R. 8 Q. B. 57; Black v. Goodrich Transp. Co., 55 Wis. 319. — ED.

form course of decisions in this and most of the other States, and public policy demands that it should not be changed. It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity, or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication.

JACOBUS *v.* ST. PAUL AND CHICAGO RAILWAY CO.

SUPREME COURT OF MINNESOTA, 1873.

[20 *Minn.* 125.]

BERRY, J.¹—The plaintiff brings this action to recover damages for injuries occasioned to his person by the alleged gross negligence of defendant's servants in charge of defendant's railway train, upon which plaintiff was travelling. Plaintiff was riding upon a free pass, which, together with the conditions endorsed, is in these words, *viz.*:

“ST. PAUL & CHICAGO RAILWAY.

“Pass D. Jacobus upon the conditions endorsed hereon, until Dec. 31st, 1871, unless otherwise ordered. Not transferable.

D. C. SHEPARD,
Chf. Eng. and Supt.”

“CONDITIONS.

“The person who accepts and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it.”

Upon the pleadings and the charge of the court, the first question arising in this case is, whether the pass with its conditions, protects defendant from liability for injury received by plaintiff while riding upon such pass, even though the injury was caused by gross negligence upon defendant's part. In our opinion, this question should be answered in the negative. For the reason that the degree of care and diligence exacted of a bailee should be proportioned to the importance of the business and of the interests at stake (*Halley v. Boston Gas Light Co.*, 8 Gray, 131; 57 Me. 202), “the law imposes upon the common carrier of passengers the greatest care and foresight for the

¹ Part of the opinion only is given. — Ed.

safety of his passengers, and holds him liable for the slightest neglect." *McLean v. Burbank*, 11 Minn. 288. And for like reasons the same extreme care is required, though the passenger be carried gratuitously. Having undertaken to carry, the duty arises to carry safely. *Phil. & Reading R. R. Co. v. Derby*, 14 Howard (U. S.), 486; *Nolton v. Western Railway*, 15 N. Y. 444; *Steamboat New World v. King*, 16 How. (U. S.) 474; 2 *Redfield on Railways*, 184-5, and notes; *Perkins v. N. Y. Central R. W. Co.* 200; *Todd v. Old Col. & F. R. R. Co.*, 3 Allen, 21.

In the case at bar, however, the plaintiff was not merely a gratuitous passenger, *i. e.* a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? Upon the question whether conditions of this kind are valid and effectual to exonerate the carrier of passengers, the adjudications differ. In New York, the conditions appear to be held sufficient to absolve the carrier from liability, even for the gross negligence of his employees. *Wells v. N. Y. Central Railway*, 24 N. Y. 181; *Perkins v. same*, *Ib.* 196; *Bissell v. same*, 25 N. Y. 442. In New Jersey, it is held that such conditions are good as against ordinary negligence, with a very decided intimation that the exemption from liability comprehends gross negligence also. *Kinney v. Cen. R. R. Co.*, 34 N. J. 513.

In Pennsylvania, Illinois, Indiana, and several other states, the courts hold that no such condition will avail to protect the carrier from responsibility for the gross negligence of its employees. *Ill. Central Co. v. Read*, 37 Ill. 484; 19 *Id.* 136; *The Ind. Cen. R. Co. v. Munday*, 21 Ind. 48; *Penn. R. Co. v. McCloskey's Adm'r*, 23 Pa. 532; *Mobile & Ohio Railway v. Hopkins*, 41 Ala. 489.

There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government as *parens patriae* has in protecting the lives and limbs of its subjects. *Shearman & Redfield on Negligence*, § 24; *C. P. & A. R. Co. v. Curran*, 19 Ohio State, 12; *Phil. and Reading R. R. Co. v. Derby*, *supra*; *Steamboat New World v. King*, *supra*; *Smith v. N. Y. Central R. Co.*, 24 N. Y. 222; *Ill. C. R. Co. v. Read*, *supra*; *Penn. R. Co. v. Henderson*, 51 Penn. 315; *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 455, per Denio, J.; *N. Y. Central R. Co. v. Lockwood* (U. S. Supreme Ct.), not yet reported.

So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is *paramount* from its very nature. No

stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire, — a merely gratuitous passenger, — or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned.

It is said, however, that it is unreasonable “to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible.” In the first place, if this consideration were allowed to prevail, it would prove too much; for it could be urged with equal force and propriety in the case of a merely gratuitous passenger, as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger, as for a passenger for hire.

Again, suppose (what is not at all impossible or improbable, as for instance in case of a free excursion,) that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility, the greater the care; and that *any* relaxation of responsibility is dangerous.

Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule imposing stringent obligations upon him. It is the enforcement of the rule, and of the liability imposed thereby — the mulcting of the carrier for his negligence — which brings home to him in the most practical, forcible, and effectual way, the necessity for strictly fulfilling his obligations.

It may be that on a given occasion the gratuitous passenger, or the passenger upon a free pass, is the only person injured, (as, for aught that appears, was the fact in this instance,) or the only party who will proceed against the carrier, the only person who will practically enforce upon the carrier the importance of a faithful discharge of his

duty. These considerations, as it seems to us, ought to be decisive upon the point that sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed though the passenger be gratuitous, or, as in this case, riding upon a conditioned free pass. It is contended that there was no proof of gross negligence on defendant's part, and that, therefore, the verdict was not justified. There was evidence that the train was a mixed train; that it was running from forty to forty-five miles an hour according to the plaintiff, and according to the other witnesses from fifteen to twenty-two miles an hour; that the lumber was upon a platform car, and that the stake of the lumber car, in consequence of the breaking of which the injury occurred, was a stick of butternut cord wood, and was cross-grained. There was also the testimony of J. T. Maxfield, of St. Paul, a passenger who appears to be an intelligent and entirely disinterested witness, and who says "I felt anxious about the lumber car. I was afraid of the speed. * * * I was apprehensive of danger from the character of our train. I spoke to the brakeman about it. * * Have travelled on trains a good deal." And taking all these facts together — to say nothing about others appearing in the case — it cannot be said that there was not evidence in the case proper to be considered by the jury, and having some reasonable tendency to establish negligence, which has been well described as being a negative word signifying the absence of such care as it is the duty of the negligent party to exercise in the particular case. *Grill v. General &c., Collier Co.*, Law Rep., 1 C. P. 612; *Steamboat New World v. King supra*. We will go further even, and say that the evidence, in our opinion, had a reasonable tendency to establish *gross* negligence in the sense of a great degree of negligence. Angell on Carriers, § 22. As to the point of the degree of negligence necessary to sustain this action, it is, however, to be remarked, in view of the stringent rule as to liability, that where the question is between a railway carrier of passengers and a passenger, there would seem to be no occasion for the ordinary distinction of different degrees of negligence, as slight, ordinary and gross. As is well and forcibly said by Mr. Justice Grier in *Philad. & Reading R. Co.*, *supra*: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" So in *Steamboat New World v. King*. Mr. Justice Curtis, referring to the doctrine thus announced, says: "We desire to be understood to re-affirm that doctrine as resting not only on public policy, but on sound principles of law." A similar view of the impracticability of a distinction between different kinds of negligence as applicable to cases of this kind is taken in

Perkins v. N. Y. Central R. Co., *supra*. The carrier being bound to exercise the greatest care, and being liable for the slightest neglect, what is said by Rolfe, B. in *Wilson v. Brett*, 11 Mees. & Welsby, 113, and endorsed by Willis, J. in *Grill v. General, &c., Collier Co.*, Law Rep., 1 C. P. 612, is in point in a case of this kind, viz.: that he "could see no difference between *negligence* and *gross negligence*; that it was the same thing with the addition of a vituperative epithet." See also Angell on Carriers, § 23, and *Briggs v. Taylor*, 28 Vt. 180.

QUIMBY v. BOSTON AND MAINE RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1890.

[150 Mass. 365.]

DEVENS, J. When the plaintiff received his injury, he was travelling upon a free pass, given him at his own solicitation and as a pure gratuity, upon which was expressed his agreement that in consideration thereof he assumed all risk of accident which might happen to him while travelling on or getting on or off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "Provided he signs the agreement on the back hereof." In fact, the agreement was not signed by the plaintiff, he not having been required to do so by the conductor, who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed it, and was not required to sign it, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Central Railroad*, 98 Mass. 239; *Hill v. Boston, Hoosac Tunnel & Western Railroad*, 144 Mass. 284; *Boston & Maine Railroad v. Chipman*, 146 Mass. 107.

The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein because he did not and was not required to sign it. *Gulf, Colorado, & Santa Fé Railway v. McGown*, 65 Texas, 640, 643; *Illinois Central Railroad v. Read*, 37 Ill. 484; *Wells v. New York Central Railroad*, 24 N. Y. 181; *Perkins v. New York Central Railroad*, 24 N. Y. 196. If this is held to be so, the case presents the single question whether such a contract is invalid, which has not heretofore been settled in this State, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been

made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18; *Commonwealth v. Vermont & Massachusetts Railroad*, 108 Mass. 7; *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478; *Files v. Boston & Albany Railroad*, 149 Mass. 204; *Philadelphia & Reading Railroad v. Derby*, 14 How. 468; *Steamboat New World v. King*, 16 How. 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases, the English courts, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a free pass, issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would, without doubt, be applied where a servant, from the peculiar character of goods, such as delicate machinery, is permitted to accompany them, and in other cases of that nature. That passes of this character are free passes properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticised by Mr. Justice Bradley, in *Railroad Co. v. Lockwood*, 17 Wall. 357, 367; and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger, instead of one for hire. *Railway Co. v. Stevens*, 95 U. S. 655, in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one travelling upon a drover's pass, as it is sometimes called, is a free passenger, they show that, in the opinion of those courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case

at bar there is no question of any wilful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the risk of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are *Griswold v. New York & New England Railroad*, 53 Conn. 371, decided in 1885, and that of *Gulf, Colorado, & Santa Fé Railway v. McGown*, 65 Texas, 640, decided in 1886, in which the precise question before us was raised and decided, after a careful examination of the authorities, and opposite conclusions reached, by the highest courts of Connecticut and of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passenger was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the Commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff, that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier is dependent upon the contract; that, while with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers in safety; and that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servants, in order that this safety may be secured to all who travel. It is also said, that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgler or seek redress in the courts; that he must take the alternative the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risks of transportation by being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in few words, public policy forbids that a contract should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity, or as a gratuity.

Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where

passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or by other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that, while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence, or that of the corporation itself where that is the carrier, he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, in respect to the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. *Steamboat New World v. King*, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of the defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or to furnish proper appliances for the conduct of its business.

We are of opinion that where one accepts purely as a gratuity a free

passage in a railroad train, upon the agreement that he will assume all risk of accident which may happen to him while travelling in such train by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must, therefore, be

Judgment for the defendant.

GRACE v. ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868.

[100 Mass. 505.]

CONTRACT, against the defendants, who carried on business under the name of the Adams Express Company, to recover the value of a package of money. In the Superior Court, judgment was ordered for the plaintiff on agreed facts, and the defendants appealed. The agreed facts were as follows:

"It is agreed that the plaintiff delivered to the Adams Express Company, as common carriers, at Wilmington, in the State of North Carolina, March 21, 1865, a package containing one hundred and fifty dollars, directed to Patrick Corbett, Taunton, Massachusetts, and the said express company at the same time delivered to the plaintiff a bill of lading, a copy whereof is hereto annexed, and which makes part of this statement; that the said express company shipped said package with other packages from Wilmington by the steamship General Lyon, which ship was accidentally burned at sea, and said package thereby destroyed. It is further agreed, if evidence of the fact be admissible, that the plaintiff would testify that when the plaintiff delivered the package and took the bill of lading, a copy of which is annexed, he did not read the same."

The material parts of the bill of lading, of which the copy was annexed, were as follows:

"Adams Express Company. Great Eastern, Western & Southern Express Forwarders. \$150. Form 5. Wilmington, March 21, 1865. Received from ——— One P., Sealed and said to contain one hundred and fifty dolls. Addressed, Patrick Corbett, Taunton, Mass.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation — such delivery to terminate all liability of this company for such package; and also, that this company is not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof. . . . occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. For the Company. Robinson."

COLT, J. It is to be received as now settled by the current and weight of authority, that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire, occurring without fault on his part. It is not necessary to discuss here, how far in this or other respects he may escape those liabilities which the policy of the law imposes, by mere notices brought home to the employer, or whether the effect of such notices may not be held to vary according as it is attempted to avoid those extraordinary responsibilities which are peculiar to common carriers, or those other liabilities under which they are held in common with all other bailees for hire. *Judson v. Western Railroad Co.*, 6 Allen, 486; *York Co. v. Central Railroad Co.*, 3 Wallace, 107; *Hooper v. Wells*, 27 Cal. 11; and see article by Redfield, with collection of authorities. 5 Am. Law Reg. (N. S.) 1.

It is claimed here that the shipping receipt or bill of lading constituted a valid and binding contract between the parties, and that, upon the loss at sea of the plaintiff's package in the course of its transportation under the contract, by an accidental fire, the defendants were discharged from any obligation to the plaintiff in regard to it; and the court are of opinion that this claim must be sustained.

The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper. The case of *Rice v. Dwight Manufacturing Co.*, 2 Cush. 80. 87, is an authority in point. In an action to recover for work done, the defence was that the work was performed under a special contract, and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, but which was not signed by either party. The plaintiff denied knowledge of its contents; but it was said by Forbes, J., that where a party enters into a written contract, in the absence of fraud he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. See also *Lewis v. Great Western Railway Co.*, 5 H. & N. 867; *Squire v. New York Central Railroad Co.*, 98 Mass. 239.

This case, then, is brought within the rule which authorizes carriers to relieve themselves from losses of this description by express contracts with the employer. It differs from the cases of *Brown v. Eastern Railroad Co.*, 11 Cush. 97, and *Malone v. Boston & Worcester Railroad Co.*, 12 Gray, 388. The limitation relied on in both those cases was in the form of a notice printed on the back of a passenger ticket, relating to baggage; and it was held that there was no presumption of law that the party, at the time of receiving the ticket, had knowledge of the contents of the notice. It is obvious that in those cases the ticket was not designed to be held as the evidence of the contract between the parties. The contract, which was of passenger transportation, was not attempted to be set forth. At most, it was but a check, to be used temporarily and then delivered to the conductor as his voucher, with these notices on the back. The presumption that every man knows the terms of a written contract which he enters into, therefore, did not apply. Nor was the acceptance of the ticket conclusive evidence of assent to its terms.

The recent case of *Buckland v. Adams Express Co.*, 97 Mass. 124, requires notice, because, upon a case in most respects similar to this, a different result was reached by the court. The legal principles upon which that case was decided are those here stated. It was a case upon an agreed statement of facts; and the difference resulted in the application of the law to the facts then presented. It is to be noticed that the receipt containing the limitation relied on was in that case delivered to a workman in the employ of a stranger, who, so far as it appears, had, in that particular instance only, been requested by the plaintiffs to deliver the parcel in their absence, and as a mere favor to them. And it further appeared that the previous course of dealing between the parties was such that, in a majority of instances in which the plaintiffs had employed the defendants to transport like packages, no receipt was made out, and no special contract insisted upon. Under such circumstances, it was held that it could not fairly be inferred that the plaintiffs understood and assented to the contents of the receipt as fixing the terms on which the defendants were to transport the merchandise, or that the workman had authority to make an unusual contract.

The same remarks apply to the case of *Perry v. Thompson*, 98 Mass. 249, which is to be distinguished from the case at bar by the fact that, in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability having been given, and by the further fact that, when the notice in that instance was received, the printed parts of it were so covered up by the revenue stamp affixed to the receipt that it could not be read intelligibly.

So in *Fillebrown v. Grand Trunk Railway Co.*, 55 Maine, 462, it was held that, when a verbal contract for transportation was made without restriction, its legal effect would not be changed by the conditions in a receipt which was subsequently given to the clerk of the

consignor, who delivered the goods at the station, but who had no express authority either to deliver or to contract with the defendants.

These cases do not reach the case at bar, where the delivery of the receipt was directly to the plaintiff; nor would they be held decisive in a case where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportation. *Squire v. New York Central Railroad Co.*, 98 Mass. 239.

*Judgment for the defendant.*¹

BLOSSOM v. DODD.

COURT OF APPEALS, NEW YORK, 1870.

[43 N. Y. 264.]

CHURCH, C. J. The common-law liability of common carriers cannot be limited by a notice, even though such notice be brought to the knowledge of the persons whose property they carry. *Dorr v. N. J. Steam Navigation Co.*, 1 Kern. 485. But such liability may be limited by express contract. *Dorr v. N. J. Steam Navigation Co.*, 1 Kern. 485; *Bissell v. N. Y. Central R. R. Co.*, 442; *French v. Buffalo, N. Y. & Erie R. R. Co.*, 4 Keyes, 108.

The principal question in this case is, whether there was a contract made between the parties limiting the liability of the defendants to a loss of \$100 for the valise and its contents, which the plaintiff intrusted to their care. A facsimile of the card upon which the alleged contract was printed has been furnished in the papers. It does not appear, on examination, like a contract, and would not, from its general appearance, be taken for anything more than a token or check denoting the numbers of the checks received, to be used for identification upon the delivery of the baggage. The larger portion of the printed matter is an advertisement, in large type. The alleged contract is printed in very small type, and is illegible in the night by the ordinary lights in a railroad car, and is not at all attractive, while other parts of the paper are quite so.

Considerable stress is laid upon the fact that the words, "Read this receipt," were printed on the card in legible type. The receipt reads: "Received of M—— articles or checks numbered as below: 368-319." "For Dodd's Express." The blank is not filled, nor is the receipt signed by any one. The invitation is not to read the contract, but the

¹ Compare: *Lawrence v. N. Y. P. & B. R. R.*, 36 Conn. 63; *L. & N. R. R. v. Brownlee*, 14 Bush, 590; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Farnham v. C. & A. R. R.*, 55 Pa. 53; *Dillard v. L. & N. R. R.*, 2 Lea, 288. — Ed.

receipt. In order to read it, the paper must be turned sideways; and no one, thus reading the receipt, would suspect that it had any connection with the alleged contract, which is printed in different and very small type across the bottom of the paper. It is no part of the receipt, is not connected with it, and is not referred to in any other part of the paper. The defendants are dealing with all classes of the community; and public policy, as well as established principles, demand that the utmost fairness should be observed.

This paper is subject to the criticism made by Lord Ellenborough, in *Butler v. Heane*, 2 Camp. 415, in which he said that "It called attention to everything that was attractive, and concealed what was calculated to repel customers;" and added: "If a common carrier is to be allowed to limit his liability, he must take care that any one who deals with him is fully informed of the limits to which he confines it." Nor did the nature of the business necessarily convey the idea of a contract to the traveller in such a manner as to raise the presumption that he knew it was a contract, expressive of the terms upon which the property was carried, or limiting the liability of the carrier. Baggage is usually identified by means of checks or tokens. And such a card does not necessarily import anything else. At all events, to have the effect claimed, the limitation should be as conspicuous and legible as other portions of the paper. In *Brown v. E. R. R. Co.*, 11 Cush. 97, where the limitation was printed upon the back of a passenger ticket, the court says: "The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on the ticket." In the case of *Prentice v. Decker*, 49 Barb. 21, and *Limburger v. Westcott*, 49 Barb. 283, limitations were claimed upon the delivery of similar cards of another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained contracts. A different construction was put upon the delivery of a similar card, in *Hopkins v. Westcott*, 6 Blatchf. R. 64; but I infer that the learned judge who delivered the opinion intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of *Grace v. Adams*, 100 Mass. 560, relied upon by the defendant's

counsel, was decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from liability for loss by fire; and the court held that he knew that the paper contained the conditions upon which the money was to be carried, and was, therefore, presumed to have assented to them, although he did not read the paper. The court say: "It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading." So, in *Van Goll v. The S. E. R. Co.*, 104 Eng. Com. Law R. 75, the same principle was decided. Willes, J., said: "Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there." Keating, J., said: "It was incumbent on the company to show that such was the contract." . . . "I think there was evidence that the plaintiff assented to those terms."

As to bills of lading and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents, or to assent to them.

The circumstances under which the paper was received repel the idea of a contract. No such intimation was made to the plaintiff. He did not, and could not, if he had tried, read it in his seat. It is found that he might have read it at the end of the car, or by the lights on the pier or in the ferryboat; and it is claimed that he should have done so, and, if dissatisfied, should have expressed his dissent. If he had done so, and, in the bustle and confusion incident to such occasions, could have found the messenger and demanded his baggage, the latter might have claimed, upon the theory of this defence, that the contract was completed at the delivery of the paper, and that he had a right to perform it and receive the compensation.

It is impossible to maintain this defence without violating established legal principles in relation to contracts. It was suggested on the argument, that the stipulation to charge according to the value of the property is just and proper. This may be true; but the traveller should have something to say about it. The contract cannot be made by one party. If the traveller is informed of the charges graduated by value, he can have a voice in the bargain; but, in this case, he had none. Whilst the carrier should be protected in his legal right to limit his responsibility, the public should also be protected against imposition and fraud. The carrier must deal with the public upon terms of equality; and, if he desires to limit his liability, he must secure the assent of those with whom he transacts business.

My conclusion is, that no contract was proved.

1. Because it was obscurely printed.

2. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper contained the contract.

3. Because the circumstances attending the delivery of the card repel the idea that the plaintiff had such knowledge, or assented in fact to the terms of the alleged contract.

The order granting a new trial must be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All the judges concurring, upon the ground that no contract limiting the liability of defendants was proved.

*Order affirmed, and judgment absolute for the plaintiff ordered.*¹

ANCHOR LINE v. DATER.

SUPREME COURT OF ILLINOIS, 1873.

[68 Ill. 369.]

BREESE, C. J.² This was an action on the case, against appellants as a common carrier, for failing to carry and deliver to the consignee two hundred barrels of flour. The general issue was pleaded, and the cause tried by the court without a jury, who found the issue for the plaintiffs, and assessed their damages at fourteen hundred dollars.

A motion for a new trial was overruled and judgment rendered for the plaintiffs.

To reverse this judgment the defendants appeal.

The flour was destroyed in the warehouse of appellants by the great October fire. It was delivered to appellants' agent late on Saturday, the 7th day of October, too late in the day to be placed on board the propeller of that day, and was warehoused in a safe warehouse.

The bill of lading delivered to the consignors relieves the carrier from liability for loss by fire, while the property is in transit or while in depots, &c.

This bill of lading, appellants insist, was the contract of the parties, by which they are bound, and the provisions of which are plainly and easily understood by any business man, and the assent of the shipper to the terms contained in it should be presumed.

The court, sitting as a jury, did not find evidence sufficient to justify it in presuming assent from the mere acceptance of the receipt. The shipper had no alternative but an acceptance of it, and his assent to its conditions cannot be inferred from that fact alone. It is in proof

¹ Compare: *Ramaley v. Leland*, 6 Robt. (N. Y.) 353. — ED.

² Part of the opinion is omitted. — ED.

that its terms and conditions were not known to these shippers, although they had accepted a large number of them in the course of their business with the appellants.

The terms and conditions of this bill of lading, or receipt, were inserted for the purpose of limiting the liability appellants were under by the common law. They should appear plainly in the instrument, be understood by the consignor, and knowingly accepted as the contract of the parties, and intended to evidence the terms of the contract. These were points for the court trying the case, and the finding of the court in this respect cannot be disturbed.

We see no cause to depart from the rule established by this court, in *Adams Express Co. v. Haynes*, 42 Ill. 89, and *Ill. Central R. R. Co. v. Frankenberg et al.*, 54 Ill. 88, and that is, if a shipper takes a receipt for his goods from a common carrier, which contains conditions limiting the liability of the carrier, with a full understanding, on the part of the shipper, of such conditions, and intending to assent to them, it becomes his contract as fully as if he had signed it, and these are questions for the jury. . . .¹

WEHMANN *v.* MINNEAPOLIS, ST. PAUL AND SAULT
SAINTE MARIE RAILWAY.

SUPREME COURT OF MINNESOTA, 1894.

[58 *Minn.* 22.]

GILFILLAN, C. J. The defendant had a connection with the Lehigh Valley Transportation Company and the Lehigh Valley Railroad Company, forming a continuous line from Minneapolis to various points in the east; the defendant's part of such continuous line being by rail from Minneapolis to Gladstone, Mich., the transportation company's part by boat from Gladstone to Buffalo, N. Y., and the Lehigh Valley Railroad Company's from Buffalo by rail to various points in the east, among them to Philadelphia. The three carriers had established and published joint or through tariffs of rates for freight carriage from Minneapolis to the various points in the east to which the continuous line extended, so as to come within the provisions of 25 U. S. Stat. ch. 382, p. 855.

Plaintiff's shipped with defendant, at Minneapolis, a carload of flour, consigned to a party named in the bill of lading at Philadelphia. It arrived at Gladstone November 21, 1891, was put in defendant's warehouse at that place, where it remained till November 29th, when it was destroyed by fire. There was no evidence on the trial that notice of the arrival of the flour at Gladstone was given to the transportation company or to the plaintiff.

¹ Compare: *Gaines v. Union T. & I. Co.*, 28 Oh. St. 418. Ed.

We do not think the establishing of joint or through rates in such cases of itself makes the different carriers in the continuous line joint carriers for the line, or makes any one of the carriers liable for the defaults of any of the others. At the most, the receiving carrier would be agent for each of the others to contract for carriage over their respective lines, so as to create a duty on each to receive goods at the point where the preceding carrier's line ends, and carry them to the end of its part of the line, and deliver them to the carrier next beyond.

The bill of lading executed by defendant to plaintiff cannot be construed to be a contract on its own behalf to carry from Minneapolis to Philadelphia, or anything more than a contract to carry over its own line to Gladstone, and there deliver to the transportation company.

Under such an arrangement for a continuous line and joint or through rates it is the duty of the first or receiving carrier, on receiving goods for carriage to any point on the continuous line beyond its own line to carry them with due despatch to the end of its line, and there deliver them to the next carrier, whose duty it is to receive and carry them with due despatch to their place of destination, and deliver them to the owner or consignee; or, if the place of destination be beyond its own line, to deliver them at the end of its line to the next carrier, to which a like duty will then attach. In such case, the owner, by delivering his goods to be carried through, does not contemplate nor make a contract for storage. His contract is for carriage, and, until the goods reach their final destination, he has a right to a continuous carrier's duty and responsibility, which cannot, without his consent, be changed to the duty and responsibility of a warehouseman, however convenient that might be for the carrier. And, from the time its duty of carrier attaches, any carrier in the line can discharge itself of the responsibility as such only by performing its full duty by carrying the goods, and delivering them to the next carrier if they are to go beyond its line. The responsibility of the preceding carrier does not cease until the responsibility of the next one attaches. Any other rule would make any arrangement for a continuous line and through rates a snare to the public.

The liability of the defendant is to be determined as though its contract had been to carry to Gladstone, and there deliver to any consignee.

There is no express evidence on the point, but under the arrangement for a continuous line, it is to be presumed that the transportation company had an agent at that point, to whom the flour might have been delivered, and to whom notice of its arrival might have been given; and that the defendant knew who that agent was.

When the consignee resides at the place of destination, or has an agent there, authorized to receive the goods, and that is known to the carrier, the latter's liability as carrier does not end, and the liability become that of a warehouseman, until the lapse, after notice to such consignee or agent that the goods have arrived, of a reasonable time to

receive and remove them. *Derosia v. Winona & St. Peter R. Co.*, 18 Minn. 133 (Gil. 119); *Pinney v. First Division St. P. & P. R. Co.*, 19 Minn. 251 (Gil. 211).

As the flour was not delivered to the transportation company, nor notice of its arrival given to its agent, so that its responsibility as carrier might attach, the responsibility of defendant as carrier had not ended at the time of the fire, unless, by virtue of a clause in the bill of lading in these words: "It being further expressly agreed that this company assumes no liability, and it is not to be held responsible as common carrier, for any loss or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damage thereto, or any delay in transportation or delivery thereof, by any connecting or succeeding carrier."

Conceding that, because this was a shipment for carriage beyond the limits of the State, the statutes of the State do not apply, and that the validity of the clause is to be determined by the principles of the common law, then the question arises, was there a consideration to support it? Such a clause, to be of force, must stand as a contract between the shipper and the carrier, and, as in the case of all contracts, there must be a consideration for it. One exercising the employment of a common carrier of goods is bound to receive and carry such (within the class of goods that he carries) as are tendered to him for the purposes, and, in the absence of special contract, to carry them with the full common-law liability of a common carrier. His receipt of and undertaking to carry them, being a duty imposed on him by law, is not a consideration to support such special contract. There must be some other. That is generally furnished by some concession in rates. And, where the agreement is set forth in the contract for carriage, it would probably be presumed that, in a case where parties could make any, there was some such concession as a consideration for relieving the carrier of part of his common-law liability. But in such a case as this, any abatement of rates is forbidden by act of Congress, and therefore none can be presumed.

The tariff of joint rates in the case makes no mention of any limitation of liability. They are to be taken, therefore, as rates established for carriage with full common carrier's liability; and under the act of Congress no abatement could be made to support a contract for a limited liability.

The clause is void for want of a consideration to support it.

Order affirmed.

EXPRESS COMPANY v. CALDWELL.

SUPREME COURT OF THE UNITED STATES, 1874.

[21 Wall. 264.]

ERROR to the Circuit Court for the Western District of Tennessee.

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee; places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefore within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than ninety days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

STRONG, J. Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable — if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. Common carriers do not deal with their em-

ployers on equal terms. There is, in a very important sense, a necessity, for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact they are without competition, except as between themselves, and that they are thus in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In *York Company v. The Central Railroad Company*, 3 Wall. 107, it is ruled that the common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, *Railroad Company v. Lockwood*, 17 Wall. 357, where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within

ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in *Railroad Company v. Lockwood*. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought

for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy. See *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386, and the numerous cases therein cited.

Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in *Wolf v. The Western Union Telegraph Co.*, 62 Penn. St. 83, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in *Young v. The Western Union Telegraph Co.*, 34 N. Y. Super. Ct. 390.

In *Lewis v. The Great Western Railway Co.*, 5 H. & N. 867, which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage, or detention would be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered." Under the last clause of this condition the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company, within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed.¹ But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defence to the action.

¹ See *Garton v. B. & E. Ry.*, 1 B. & S. 112; *Capehart v. S. & R. R. R.*, 81 N. C. 438; *Adams Exp. Co. v. Reagan*, 29 Ind. 21. See *Glenn v. Southern Exp. Co.*, 86 Tenn. 594.—Ed.

We have been referred to one case which seems to intimate, and perhaps should be regarded as deciding that a stipulation somewhat like that pleaded here is insufficient to protect the carrier. It is the *Southern Express Company v. Caperton*, 44 Ala. 101. There the receipts for the goods contained a provision that there should be no liability for any loss unless the claim therefor should be made in writing, at the office of the company at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. The receipt was signed by the agent of the company alone. It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier. The court, after remarking that a carrier cannot avoid his responsibility by any mere general notice, nor contract for exemption from liability for his negligence or that of his servants, added that he could not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud; that it was the duty of the "defendant to deliver the package to the consignee, and that it was more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that too under the protection of a writing signed only by its agent, the assent to which by the other party was only proven by his acceptance of the paper." This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract. The case cited from 36 Ga. 532, has no relation to the question before us. It has reference to the inquiry, what is sufficient proof of an agreement between the shipper and the carrier, an inquiry that does not arise in the present case, for the demurrer admits an express agreement.

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

*Judgment reversed, and the cause remanded for further proceedings, in conformity with this opinion.*¹

¹ See *W. U. T. Co. v. Dunfield*, 11 Col. 335; *Black v. W. S. L. & P. Ry.*, 111 Ill. 351; *Sprague v. M. P. Ry.*, 34 Kans. 347. See also *Western Ry. v. Little*, 86 Ala. 159; *Phifer v. C. C. Ry.*, 89 N. C. 311. — Ed.

COX *v.* CENTRAL VERMONT RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1898.

[170 *Mass.* 129.]

MORTON, J.¹ These twelve actions were all tried together, and all relate to certain grain which was being transported from Chicago to various points in New England, and which was destroyed by fire while in the defendant's elevator at Ogdensburg, on September 9, 1890. The declarations are the same in all of the cases. Counts in contract were joined with counts in tort, the last count, which was the one relied on, being in tort, and charging the defendant with negligence as a warehouseman.

In all of the cases except the last, verdicts were rendered for the plaintiffs. In the last, a verdict was ordered by the court for the defendant, on the ground that the action was not brought within three months after the loss occurred, as provided in the bill of lading, or from the time when by due diligence the plaintiff might have discovered that fact.

In nine of the cases, namely, those of Cox, Ambler, Burditt, Dennis, Prentiss, Crosby, Johnson, Train, and Landon, the grain was being transported under what were termed yellow bills of lading, which provided, amongst other things, that "the said company shall not, nor shall any carrier, person, or party aforesaid be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months after the said loss or damage occurs." They also provided that neither the company nor any carrier, person, or party in possession of said grain "shall . . . be liable for any loss or damage from . . . fire while . . . in store at any place of shipment or transshipment, . . . nor shall there be any liability . . . for any loss or damage . . . unless the same shall affirmatively and without presumption be proven to have been caused by the negligence of the person or party sought to be made liable." In the cases of Whiting, Edgerley, and Chase, the grain was being transported under what were termed white bills of lading, which contained no limitations as to the time within which notice of the loss should be given, or the action should be brought, but which provided that "no carrier or the property of any shall be liable for . . . any loss or damage arising from any of the following causes, viz. fire from any cause, on land or water," etc. In only two of the cases, namely, those of Dennis and Prentiss, was there any evidence tending to show that written notice of loss was given. . . .

It is well settled that common carriers may enter into contracts limiting their responsibility, if the effect is not to relieve them from

¹ Part of the opinion only is given. — ED.

the consequences of their own negligence, or that of their servants, and the contracts are in themselves just and reasonable. . . .

Whether the contracts are just and reasonable has been treated as a question for the court, where the facts are not in dispute. *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 342.

The effect of the stipulation in the white bills of lading in regard to exemption from liability for loss by fire would be to relieve the carrier absolutely from liability for loss caused by fire, though resulting from its own negligence or that of its servants or agents. This it cannot do. That also would be the effect of the provision in regard to the amount of proof, unless the proof came up to the height required. We think that the defendant cannot evade in this manner the liability imposed on it by law for the consequences of its negligence and that of its servants or agents, and that this provision is therefore invalid.

In regard to the provision in the yellow bills of lading requiring notice of any loss or damage to be given to the defendant within thirty days after the same accrued, the court instructed the jury that it was just and reasonable, and that it was binding on the plaintiffs, provided that the defendant proved that they clearly and unequivocally assented to it. There are no doubt in some of the earlier cases in this State expressions which would seem to justify the language of the charge. *Judson v. Western Railroad*, 6 Allen, 486. *Buckland v. Adams Express Co.*, 97 Mass. 124, 135. *Perry v. Thompson*, 98 Mass. 249. But we think that the law must now be regarded as settled in this Commonwealth in conformity with the weight of authority elsewhere, that one who receives from a common carrier a bill of lading which purports on its face to set forth the terms of carriage, and accepts and acts upon it, without objection, will be ordinarily presumed as in other cases of contract, in the absence of fraud or other sufficient excuse, to have assented to its terms, so far as the provisions therein contained are lawful and not opposed to public policy. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. *Gott v. Dinsmore*, 111 Mass. 45. *Parker v. Southeastern Railway*, 1 C. P. D. 618. *Grace v. Adams*, 100 Mass. 505. *Porter*, Bills of Lading, §§ 150 *et seq.* *Hutchinson*, Carriers, §§ 240 *et seq.* 4 Am. & Eng. Encyc. of Law, 516. 2 Am. & Eng. Encyc. of Law, 292-294.

In this view of the law the instruction was erroneous, and there must be a new trial if the stipulation was a just and reasonable one. If it was not, then the instruction was too favorable to the defendant, and it has no just cause for complaint.

The defendant relies on the failure of the plaintiffs to comply with the stipulation. The burden is on it, therefore, to show that the stipulation was a just and reasonable one. *Lewis v. Smith*, 107 Mass. 334. *Keene v. New England Accident Association*, 161 Mass. 149. *Lewis v. Great Western Railway*, 3 Q. B. D. 195. 5 Am. & Eng. Encyc. of Law, 326.

It is to be observed that the thirty days were to begin, not from the time when the shipper or consignee received notice of the loss or damage, but from the time when it occurred. There was evidence that the grain was being transported by what is known as a lake and rail route; that is, it was brought by water from Chicago to Ogdensburg, and there unloaded into the defendant's elevator and held subject to order for shipment by rail to various parts of New England. It did not clearly appear what was the length of time usually required from Chicago to Ogdensburg; one witness testifying that it took from seven to ten weeks and another from five to seven days. But after the grain reached Ogdensburg some time naturally would elapse before it reached its final destination, and, in ordinary course, the shipper or consignee would not probably learn of the loss or damage till then. Further time naturally would be required in the usual course of business to ascertain the facts respecting the loss before making a demand on the carrier. It may be easily conceived, therefore, that the whole thirty days might expire without fault on the part of the consignee or shipper before he would be in a position to assert a claim against the carrier. Taking the nature of the defendant's business into account, it was reasonable that there should be some time fixed within which notice of claims against it for loss or damage occurring in the course of transportation should be presented. But, for the reasons given, we are not satisfied that the time fixed in the present cases was just and reasonable, and we think therefore that the stipulation must be regarded as invalid. *Central Vermont Railroad v. Soper*, 59 Fed. Rep. 879.

It is possible that notice might be given within thirty days, as was done in the cases of *Prentiss* and *Dennis*, but the question of reasonableness or unreasonableness does not depend on the possibility of giving the notice in a particular case within the time limited, but on the course and nature of the business, and on the time which ordinarily might be expected to elapse in the usual course of business before the shipper or the consignee with ordinary diligence would be in a position to make demand on the defendant. If, applying these considerations, the time within which the notice was to be given was reasonable, it would furnish no excuse that in a particular instance it proved insufficient. Parties failing to comply with the requirement would do so at their peril.

Landon's case stands differently from any other. It is the only one in which suit was not brought within three months after the loss occurred. This provision is separable from that requiring thirty days' notice, and is, we think, just and reasonable. He has suffered the time to elapse without bringing suit, and we think that the provision operates as a bar to the maintenance of this action. . . .

Exceptions overruled.



PRIMROSE v. WESTERN UNION TELEGRAPH CO.

SUPREME COURT OF THE UNITED STATES, 1894.

[154 U. S. 1.]

GRAY, J.¹ This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line:—

" Read the notice and agreement on back of this blank."

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1st.] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the original office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d.] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d.] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employee of the company is authorized to vary the foregoing."

"[4th.] The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of

¹ Part of the opinion, discussing the measure of damages, is omitted. — Ed.

which are directly involved in this case, are that part of the first, by which the company is not to be liable for mistakes in the transmission or delivery of any message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that part of the third, by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. *Express Co. v. Caldwell*, 21 Wall. 264, 269, 270; *Telegraph Co. v. Texas*, 105 U. S. 460, 464.

The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order of message, which is not to be carried in the form or characters in which it is received, but it is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in *Express Co. v. Caldwell*, above cited: "Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be

determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that "Where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 343.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants, or otherwise.

In *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 453, the effect of such a regulation was presented by the certificate of the Circuit Court, but was not passed upon by this court, because it was of opinion that upon the facts of the case the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in *McAndrew v. Electric Tel. Co.*, 17 C. B. 3, and in *Baxter v. Dominion Tel. Co.*, 37 U. C. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.¹

The only cases, cited by the plaintiff, in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy

¹ The learned judge cited, to the same effect, *Camp v. W. U. T. Co.*, 1 Met. (Ky.) 164; *W. U. T. Co. v. Carew*, 15 Mich. 525; *Birney v. N. Y. & W. T. Co.*, 18 Md. 341; *U. S. T. Co. v. Gildersleeve*, 29 Md. 232; *Passmore v. W. U. T. Co.*, 9 Phila. 90, 78 Pa. 246; *W. U. T. Co. v. Stevenson*, 128 Pa. 442; *Breese v. U. S. T. Co.*, 48 N. Y. 132; *Kiley v. W. U. T. Co.*, 109 N. Y. 231; and other cases. — Ed.

and void, appear to be *Tyler v. Western Union Tel. Co.*, 60 Illinois, 421, and 74 Illinois, 168; *Ayer v. Western Union Tel. Co.*, 79 Maine, 493; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Western Union Tel. Co. v. Crall*, 38 Kansas, 679; *Western Union Tel. Co. v. Howell*, 38 Kansas, 685; and a charge to the jury by Mr. Justice Woods, when circuit judge, as reported in *Dorgan v. Telegraph Co.*, 1 Amer. Law Times (N. S.), 406, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in *Tyler v. Western Union Tel. Co.*, above cited.

In that case, the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker, "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The Supreme Court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Illinois, 439.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender is a contract or not, depends on circumstances," and "whether he had knowledge of its terms and consented to its restrictions is for the jury to determine as a question of fact upon evidence *aliunde*." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their own control," but "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Illinois, 431-433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not; or else to allow to the stipulation no effect whatever, for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court, when the case came before it a second time, as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a

message is written, is a contract, we held, it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent of the original charges." 74 Illinois, 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one under which appellees defended, is a reasonable regulation and amounts to a contract." And again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Illinois, 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back he did not venture to say that he had not read it; still less, that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message, and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them only, and was in these words: "Despot am exceedingly busy bay all kinds *quo* perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June 16, the mistake, in the first word, of "despot" for "destroy," by which, for a word signifying, to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June 15, there was substituted a word signifying that his message of June 17 had been received (which was evidently impossible), could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting, for the last word "purchase" in the singular, the word "purchases" in the plural, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's offices at Brookville and Ellis, in the State of Kansas (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial), prove that the message was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form; and that, as written down by the operator at Ellis, it was in its altered form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the truth. Nor is there anything in the case, tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis; or else in a mistake of the operator at Ellis, in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor

the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employee of the company is authorized to vary the foregoing," which evidently includes this, as well as other restrictions.

It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville, in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message; and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employee of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

*Judgment affirmed.*¹

FULLER, C. J., and HARLAN, J., dissented.

¹ See, *contra*, Reed v. W. U. T. Co., 135 Mo. 661. — Ed.

BELGER *v.* DINSMORE.

COMMISSION OF APPEALS, NEW YORK, 1872.

[51 N. Y. 166.]

APPEAL from an order of the General Term of the Supreme Court in the first judicial district, setting aside a verdict in favor of defendant and granting a new trial. Reported below, 51 Barb. 69; 34 How. Pr. 421.

The action was brought to recover the value of a trunk and its contents delivered by the plaintiff to the defendant for transportation, but which never reached its place of destination.

It was shown, on the trial, that six trunks and three boxes were delivered on the 4th day of May, 1864, by the wife of the plaintiff to the Adams Express Company to be carried from Baltimore, Maryland, to Newport, Rhode Island.

When the said trunks and boxes were received by the company, a receipt was given therefor.¹

The counsel for the plaintiff then offered to prove negligence on the part of the defendant, insisting that it had been guilty of gross negligence and carelessness, but the court excluded such proof, and held that the said receipt was, to all intents and purposes, a contract between the parties, and that defendant was by it excused from all liability, except as stated in the receipt. To this ruling the counsel for the plaintiff excepted.

The court then, after the refusal of a request by the plaintiff to go to the jury on the question of gross negligence, against his exception, charged the jury that the contents of the said receipt were a contract binding on the plaintiff, and limited the liability of the Adams Express Company, and of the defendant for any loss of or damage to any of the contents of any of the trunks or boxes specified in said receipt to the sum of fifty dollars, and directed the jury to find a verdict for the plaintiff for fifty dollars principal, with interest from the date of the receipt. To which charge and direction the plaintiff's counsel excepted.

The court ordered the exceptions to be heard in the first instance at General Term, and that judgment be in the meantime suspended.

LOTT, C. C. The parties appear to agree upon two propositions, as established by the decision of the courts in this State.

1st. That the appellant, the Adams Express Company, is a common carrier.

2d. That common carriers may limit their liability by express contract.

The question, then, arises whether there was such a contract in this case. The instrument relied on as evidence of the contract, as has al-

¹ Part of the case is omitted. — ED.

ready been stated, does not merely acknowledge the delivery and receipt of the property in question to the express company for transportation, but, in connection therewith, it is declared to be a part of the terms and conditions on which it was received that the company was not to be responsible for loss and damages resulting from certain specified causes, unless proved to have occurred from fraud or gross negligence of the company or its agents; and that the holder thereof should not, in any event, demand beyond the sum of fifty dollars, fixed as the value of the article to be carried, unless otherwise expressed. A party accepting such an instrument, as has been already shown, declares his assent by such acceptance, to those terms and conditions. They thereby become obligatory on both parties, and prescribe their mutual rights and obligations.

On the application of that rule to this case, the plaintiff assented (by omitting to have a different value expressed in the instrument) to the valuation of the property in question at the sum of fifty dollars, and to the restriction and limitation of his claim and demand for damages, in case of its loss, at that sum. Such liquidation of its value was for the advantage of both parties, to guard against controversy or difference of opinion in estimating it, in case of loss and damage, and as a protection against fraud. It is reasonable to assume that the price or compensation for the transportation of property has relation to the restricted or limited liability assumed on agreeing to transport it, and is to a great degree regulated and graduated by its value; and if a party only pays the price fixed for articles of small value, or estimated at a low sum, he himself bears all risks beyond that value or price. The plaintiff in this case must be assumed to have paid freight on the trunk in question and its contents, worth \$467, at the rate prescribed for an article not exceeding fifty dollars in value. He was then willing and agreed to assume all risks for the excess in value, and to relieve the company from all liability on account thereof beyond that sum. He can with no more propriety or justice claim remuneration therefor than the company could demand additional freight thereon.

The rulings of the judge at the circuit were in accordance with those principles, and the General Term appear to have placed their decision, in directing a new trial, on the ground that the provision to which I have above referred, although contained in the receipt itself, was a notice merely, which it is said, in the opinion of the court, "at most is only a proposal for a special contract which requires the assent of the other party." The material fact in this case appears to be entirely overlooked, that the plaintiff, by accepting the receipt as evidence of the defendant's obligation and liability, gave his assent to what was considered as a proposal, and to all its terms and conditions, and that it thereby became operative and effectual as a contract.

The views above expressed show that the order of General Term, in setting aside the verdict and ordering a new trial, was erroneous. It must, therefore, be reversed and judgment on the verdict must be ren-

dered against the defendant, with the costs of both appeals to the appellant.

All concur.

*Order reversed, and judgment accordingly.*¹

MOULTON v. St. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY.

SUPREME COURT OF MINNESOTA, 1883.

[31 *Minn.* 85.]

DICKINSON, J.² The plaintiffs shipped two carloads of horses at St. Paul, over defendant's line of road, to points in Dakota. Two of the horses died by reason of prolonged exposure to cold weather, as is claimed, caused by defendant's negligent detention of the train during transportation. The action is for the recovery of the value of these two horses, which appears to have been \$200 each. For the purposes of this appeal, we are to consider the negligence of the defendant as established, and are to determine whether the defendant is liable for its negligence, and the measure or extent of its liability under the contract made by the parties.

The contract under which the property was shipped, and which was executed by both plaintiffs and defendant, contained the provisions that in consideration that the defendant would transport the property at the rate of \$75 per carload, "the same being a rate given, subject to the conditions of this contract," the plaintiffs released the defendant from the liability of a common carrier, and from any liability for any delay in shipping the stock after its delivery to the defendant, and agreed that the liability of the defendant should be only that of a private carrier for hire. The plaintiffs contracted to assume all risk of damage which might be sustained by reason of any delay in transportation, and all risk of damage from any other cause, not resulting from the wilful negligence of the agents of the defendant. It was further agreed that, in case of total loss, the damage should in no case exceed the sum of \$100 per head, and, in case of partial loss, damage should

¹ "If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier.

"If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus gets reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which by deceit he caused the carrier to fix. To hold otherwise would be to enable the shipper to take advantage of his own wrong." ZOLLARS, J., in *Rosenfeld v. P. D. & E. Ry.*, 103 Ind. 121. — Ed.

² Part of the opinion is omitted. — Ed.

be measured in the same proportion. A printed "regulation" of the defendant, attached to the contract, provided that the defendant would not assume any liability over \$100 per head on horses and valuable live-stock, except by special agreement. By the contract of the parties the owner of the horses attended and cared for them upon the passage, without extra charge for his own transportation. . . .

The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is partially relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property. This would be mere evasion, which would not be tolerated. Yet there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized.

Upon the face of the contract under consideration, it is apparent that it was not the purpose of the parties to liquidate the damages recoverable, with reference to the value of the property consigned to the carrier. Its provisions are somewhat contradictory, and not easily reconciled. The general regulation attached to the contract, to the effect that the company "will not assume any liability over one hundred dollars per head on horses and valuable live-stock except by special agreement," is plainly opposed to the law as established, so far as regards the negligence of the carrier. As a regulation it is, therefore, of no effect. The law declares that the carrier shall be liable to the extent of the value of the property, although there be no special agreement. We do not question the right of a carrier to require the disclosure, by the consignor, of the value of the property presented for transportation, where its value is not apparent and well known. This is reasonable, both to the end that proper care may be taken of the property while it is in the hands of the carrier, and because the proper charges for transportation may often depend largely upon value. We see nothing, however, in this contract which can be regarded as having been intended as calling for such a disclosure on the part of the plaintiffs, or as estopping them from claiming a recovery, upon the ground of the carrier's negligence, of the actual value of the horses. In terms, the contract purports to relieve the defendant from liability, even for

its own negligence, and, at the same time, if a recovery shall be had notwithstanding this agreement, then the amount of such recovery is limited to the sum of \$100 per head. These stipulations cannot naturally be applied to a case involving as the cause of action the negligence of the carrier, without making them, in effect, to be an agreement in the first place for absolute exemption from liability (except for wilful negligence); and if, notwithstanding the agreed exemption, a recovery should be awarded, it shall not exceed the sum named; that is to say (as applied to a case of negligence), it is, in effect, an agreement for absolute exemption, and, that failing to be sustained, then for a partial exemption, from the liability which the law imposes in such cases, and which cannot be laid aside by the mere consent of parties. Such a contract cannot be sustained.

Order affirmed.

HART v. PENNSYLVANIA RAILROAD.

SUPREME COURT OF THE UNITED STATES, 1884.

[112 U. S. 331.]

BLATCHFORD, J. It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load." Then follow in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.¹

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It

¹ The learned judge here examined the following cases. *York Co. v. Central R. R.*, 3 Wall. 107; *R. R. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 Wall. 264; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174. — Ed.

may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; *Relf v. Rapp*, 3 Watts & Serg. 21; *Dunlap v. International Steamboat Co.*, 98 Massachusetts, 371; *Railroad Co. v. Fra-loff*, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

This principle is not a new one. In *Gibbon v. Paynton*, 4 Burrows,

2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive runs the risk of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is *Batson v. Donovan*, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in *Newburger v. Howard*, 6 Philadelphia Rep. 174; *Squire v. New York Central R. R. Co.*, 98 Massachusetts, 239; *Hopkins v. Westcott*, 6 Blatchf. 64; *Belger v. Dinsmore*, 51 New York, 166; *Oppenheimer v. United States Express Co.*, 69 Illinois, 62; *Magnin v. Dinsmore*, 56 New York, 168, and 62 New York, 35, and 70 New York, 410; *Earnest v. Express Co.*, 1 Woods, 573; *Elkins v. Empire Transportation Co.*, 81* Pennsylvania St. 315; *South & North Alabama R. R. Co. v. Henlein*, 52 Alabama, 606; *Same v. Same*, 56 Alabama, 386; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute R. R. Co.*, 74 Missouri, 538; and *Graves v. Lake Shore Ry. Co.*, 137 Massachusetts, 33. The contrary rule is sustained in *Southern Express Co. v. Moon*, 39 Mississippi, 822; *The City of Norwich*, 4 Ben. 271; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transportation Co.*, 55 Wisconsin, 319; *Chicago, St. Louis & N. O. R. R. Co. v. Abels*, 60 Mississippi, 1017; *Kansas City, &c., Railroad Co. v. Simpson*, 30 Kansas, 645; and *Moulton v. St. Paul, &c. R. R. Co.*, 31 Minnesota, 85. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from lia-

bility beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the Act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Central R. R. Co.*, 98 Massachusetts, 239, 245, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is

*Affirmed.*¹

GRAVES v. LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1884.

[137 Mass. 33.]

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The

¹ Compare: *Graves v. Adams Express Co.*, 176 Mass. 280; *Ballou v. Earle*, 17 R. I. 441. — ED.

bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of \$20 per barrel, owner's risk of leakage." It also contained the agreement, that, "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule, that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried; this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Judson v. Western Railroad*, 6 Allen, 486.

The plaintiffs admit that their valuation of the goods would be con-

clusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods to be \$20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he intrusts to the carrier, should not be bound by his valuation. *M'Cance v. London & North Western Railway*, 7 H. & N. 437; s. c. 3 H. & C. 343; *Railroad v. Fraloff*, 100 U. S. 24; *Muser v. Holland*, 17 Blatchf. C. C. 412; s. c. 1 Fed. Rep. 382; *Hart v. Pennsylvania Railroad*, 2 McCrary, 333; s. c. 7 Fed. Rep. 630; *Magnin v. Dinsmore*, 70 N. Y. 410.

We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than \$20 per barrel.

*Judgment affirmed.*¹

¹ Compare: *The Lydian Monarch*, 23 Fed. 298; *Brown v. S. S. Co.*, 147 Mass. 58.
— ED.

CAU v. TEXAS AND PACIFIC RAILWAY CO.

SUPREME COURT OF THE UNITED STATES, 1904.

[194 U. S. 427]

THIS is an action to recover the value of cotton delivered by plaintiff to defendant, to be transported over its railroad from Texarkana, Texas, to New Orleans. The cotton was destroyed by fire while in the custody of defendant.

The action was originally brought in the Civil District Court of the Parish of Orleans and removed on the petition of defendant to the Circuit Court of the United States for the Eastern District of Louisiana. The case was tried by a jury, which, under the instructions of the court, rendered a verdict for defendant, upon which judgment was entered dismissing the suit with costs. 113 Fed. Rep. 91.

The main question presented by the record is the effect of a provision in the bills of lading delivered by defendant to plaintiff, exempting it from liability for damages caused by fire. Incidentally a question arises as to the burden of proof. At the time of the delivery of the cotton there were four bills of lading issued by defendant — three exactly alike and the fourth substantially like the other three in all that is material to this case. They all contain the following provision: "That neither the Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire. . . ." ¹

Mc KENNA, J. It is well settled that the carrier may limit his common law liability. *York Co. v. Central Railroad*, 3 Wall. 107. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which, the common law or limited liability, he will ship his goods."

If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

¹ The evidence is omitted. — Ed.

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

(2) It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Co. v. Central Railroad*, *supra*. In response it was said: "The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads.

(3) The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the burden of proof is upon the defendant to show that the fire was not caused by its negligence or that of its servants. The contention is answered by *Clark v. Barnwell*, 12 How. 272. In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accidents of the seas and navigation excepted. It was held that after the damage to the goods had been established the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that even if the damage so occurred, yet if it might have been avoided by skill and diligence at the time the carrier was liable. "But," it was observed, "in this stage and posture of the case the burden is upon the plaintiff to establish the negligence as the burden is upon him." The doctrine was affirmed in *Transportation Co. v. Downer*, 11 Wall. 129. See also section 218, 2 Greenleaf on Evidence. *Judgment affirmed.*

BOSTON & MAINE RAILROAD v. HOOKER.

SUPREME COURT OF THE UNITED STATES, 1914.

[233 U. S. 97.]

DAY, J. Katharine Hooker brought an action in the Superior Court of Middlesex County, Massachusetts, to recover from the Boston & Maine Railroad as a common carrier on account of the loss of certain baggage belonging to her, which had been transported by the defendant in

interstate commerce from Boston, Massachusetts, to Sunapee Lake station, New Hampshire, on September 15, 1908. The plaintiff recovered a judgment for the value of the baggage lost with interest. The case was taken to the Supreme Judicial Court of Massachusetts upon exceptions of the defendant, and upon its rescript, returned to the Superior Court overruling the exceptions (209 Mass. 598), judgment was there entered for the plaintiff for \$2,253.77.

The defendant insists that the recovery of the plaintiff should have been limited to the sum of \$100, in view of certain requirements made by it concerning the transportation of baggage and filed with the Interstate Commerce Commission. From the findings of fact it appears that the baggage was checked upon a first class ticket purchased for the plaintiff (although not used by her, she travelling upon another similar ticket purchased by herself); that at the time the baggage was checked the plaintiff had no notice of the regulations hereinafter referred to limiting the liability of the defendant (further than such notice is to be presumed from the schedules filed and posted as hereinafter stated); that no inquiry was made by the defendant on receiving the plaintiff's baggage as to its value; that there was no evidence that any more expensive or different mode of transportation was adopted for baggage the value of which was declared to exceed \$100 than for other baggage; that any reasonable person would infer from the outward appearance of the plaintiff's baggage when tendered to the defendant for transportation that the value largely exceeded \$100, and that the loss of plaintiff's baggage was due to the negligence of defendant.

The court further found that previous to and during September, 1908, the defendant had published and kept open for inspection and filed with the Interstate Commerce Commission, in accordance with the Act of Congress relating to interstate commerce and amendments thereto and the orders and regulations of the Commission, schedules giving the rates, fares and charges for transportation between different points, including Boston and Sunapee Lake station, all terminal, storage and other charges required by the Commission, all privileges and facilities granted or allowed, and all rules or regulations which in any way affected or determined such rates, fares and charges or the value of the service rendered to passengers; that during the same time, in accordance with an order of the Commission of June 2, 1908, making comprehensive regulations as to rate and fare schedules, the defendant had placed with its agent in Boston all rate and fare schedules and the terminal and other charges applicable to that station, and had enabled and required him to keep in accessible form a file of such schedules, and had instructed him to give information contained therein to all seeking it and to afford to inquirers opportunity to examine the schedules, and that the defendant in the manner shown and in all other ways conformed to the acts of Congress and the orders and regulations of the

Commission with reference to such schedules. The court also found that the schedules contained provisions limiting the free transportation of baggage to a certain weight and the liability of the defendant to \$100, followed by a table of charges for excess weight, and also contained the following provision:

"For excess value the rate will be one-half of the current excess baggage rate per one hundred pounds for each one hundred dollars, or fraction thereof, of increased value declared. The minimum charge for excess value will be fifteen cents.

"Baggage liability is limited to personal baggage not to exceed one hundred dollars in value for a passenger presenting a full ticket and fifty dollars in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of taking the baggage" (p. 600); that the excess charge for transporting baggage valued at \$1,904.50 which was the value of the baggage lost, from Boston to Sunapee Lake station during September, 1908, according to the schedules, was \$4.75; that notices were posted at or near the offices where passengers' tickets were sold in the Boston station stating that tariffs naming the rates on interstate traffic were on file with the agent and would be furnished for inspection upon application, and that notices were posted in the baggage room of that station, in a conspicuous place and in sight of persons using the room for checking baggage, reading that personal baggage not exceeding \$100 in value would be checked free for each passenger on presentation of a first class ticket and containing information with reference to excess weight. And the court further found that the plaintiff did not declare at the time her baggage was checked that it exceeded \$100 in value and did not pay any charges for valuation in excess of that amount.

It is to be borne in mind that the action as tried and decided in the state court was not for negligence of the Railroad Company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake station, but was solely upon the contract of carriage in interstate commerce.

The Supreme Judicial Court of Massachusetts, in deciding the case, held that the Interstate Commerce Act did not in any wise change the common law rule, applicable in Massachusetts, that regulations of this character, limiting the amount of recovery for baggage lost, must be brought home to the knowledge of the shipper and assented to or circumstances shown from which assent might be implied. In reaching this conclusion that learned court relied upon the case of *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, in which case it was held that a State might apply its local law and policy to recovery for the loss of a horse shipped in interstate commerce from Albany, New York, to Cynwyd, in the State of Pennsylvania, and injured by the negligence of a carrier in the latter State, notwithstanding the bill of lading contained an express condition that the carrier assumed liability to the extent only of the agreed valuation in event of loss. It was further

held in the Hughes Case that the Interstate Commerce Act, in the respect then under consideration, had not enacted an exclusive rule upon which recovery might be had governing responsibility for loss, and that as the law then stood the State might enforce its own regulations authorized by statute or judicial decision as to responsibility for such negligence.

Since the decision in the Hughes Case the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed, and this court has held that by virtue of that act (particularly § 20, the Carmack Amendment) the subject of interstate transportation of property has been regulated by federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation. In this connection we may refer to the cases of *Adams Express Co. v. Croninger*, 226 U. S. 491; *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657.

Before these cases were decided this court had held that the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike and from which there could be no departure. *Gulf, Colorado & Santa Fe Ry. v. Hefley*, 158 U. S. 98; *Texas & Pac. Ry. Co. v. Mugg*, 202 U. S. 242; *Armour Packing Co. v. United States*, 209 U. S. 56, 81; *Louis. & Nash. R. R. v. Mottley*, 219 U. S. 467, 476. This principle it will be perceived was fully recognized in the series of cases decided since the passage of the Hepburn Act, beginning with the case of *Adams Express Co. v. Croninger*, *supra*. It is true that the Carmack Amendment requires a receipt or bill of lading to be issued concerning shipments of property in interstate commerce and that in the cases construing that amendment a bill of lading was issued, and according to the circumstances of the case the bill of lading and its effect are discussed in each of these, but the effect of filing the schedule is not lost sight of and the doctrine of the previous cases as to the purpose of filing and the necessity of adherence to such schedule is uniformly recognized.

The court below, after conceding that the subject-matter of passenger's baggage in interstate travel is within the control of Congress, and saying that there was no specific regulation respecting it, said (p. 602):

"The precise position of the defendant is that as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which under the interstate commerce law it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent or even misrepresentation. *Gulf, Colorado & Santa Fe Railway v. Hefley*, 158 U. S. 98. *Texas & Pacific*

Railway v. Mugg, 202 U. S. 242. Melody v. Great Northern Railway, 25 So. Dak. 606."

It follows therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at \$100 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached. As to the finding that the plaintiff's baggage was apparently worth more than \$100, as above set forth, it appears that the contents of the two trunks and suit case were not disclosed or known to the carrier, and the finding in this respect, necessarily based on the appearance of the baggage, cannot be said to show a procurement of transportation in violation of the requirements of the filed schedules at a rate disproportionate to its known value.

Let us now turn to the Interstate Commerce Act and see whether the matter of the limitation of baggage liability is covered by that act.

It seems to us that the ordinary signification of the terms used in the act would cover such requirements as are here made for the amount of recovery for baggage lost by the carrier. It is a regulation which fixes and determines the amount to be charged for the carriage in view of the responsibility assumed, and it also affects the value of the service rendered to the passenger.

Turning to the act itself we think the conclusion that this limitation is a regulation required to be filed by the act is strengthened by section 22¹ which provides: ". . . But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, *together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act.*" This section would indicate that Congress thought that section 6 of the act had to do with specifications of the amount of baggage which would be carried free and that such regulations should be filed under the requirement of section 6 to which it referred.

We are therefore of the opinion that the requirement published concerning the amount of the liability of the defendant based upon addi-

¹ As amended by the Act of Feb. 8, 1895, c. 61, 28 Stat. 643.

tional payment where baggage was declared to exceed \$100 in value was determinative of the rate to be charged and did affect the service to be rendered to the passenger, as it fixed the price to be paid for the service rendered in the particular case, and was, therefore, a regulation within the meaning of the statute.

By requiring the baggage regulations, including the excess valuation rate, to be filed and become part of the tariff schedules, the rule of the common law that the carrier becomes an insurer of the safety of baggage against accidents not the act of God or the public enemy or the fault of the passenger (the rule established in this country, 3 Hutchinson on Carriers, § 1241) was not changed. The effect of such filing is to permit the carrier by such regulations to obtain commensurate compensation for the responsibility assumed for the safety of the passenger's baggage, and to require the passenger whose knowledge of the character and value of his baggage is peculiarly his own to declare its value and pay for the excess amount. There is no question of the reasonableness or propriety of making such regulations, which would be binding upon the passenger if brought to his knowledge in such wise as to make an agreement or what is tantamount thereto. This much is conceded by the learned counsel for the plaintiff in error. The liability of a carrier under the Interstate Commerce Act was said, in the Croninger Case (226 U. S. p. 511), to be (aside from the responsibility for the default of a connecting carrier) "not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States." And in that case (p. 509) it was laid down as the established rule of common law "as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." And see the previous cases in the court there cited. But the effect of the regulations, filed as required, giving notice of rates based upon value when the baggage to be transported was of a higher value than \$100, and the delivery and acceptance of the baggage without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of \$100 only.

The language of the regulation filed, reads: Baggage liability is limited to personal baggage not to exceed \$100 in value, etc., unless a greater value is declared, etc. We have said that this limitation does not relieve from the insurer's liability when the loss occurs otherwise than by negligence, and we think it applies equally when negligence of the carrier is the cause of loss, as is found in this case. The effect of the filing gives the regulation as to baggage the force of a contract determining "Baggage liability." In *Hart v. Pennsylvania R. R.*, 112 U. S. 331, 341, followed in the later cases in this court, it was held that a recovery may not be had above the amount stipulated though the

loss results from the carrier's negligence. "The carrier must respond for negligence up to that value." The discussion and conclusion reached in the Croninger and Carl Cases, *supra*, leave nothing to be said on this point. This rule is recognized in *New York, Tewes v. North German Lloyd S. S. Co.*, 186 N. Y. 151; *Gardiner v. N. Y. Central & H. R. R. R.*, 201 N. Y. 387.

If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce. This being the fact, we think the limitation of liability to \$100 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full value of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum.

We do not think the requirement of the Carmack Amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, required other receipts than baggage checks, which it is shown were issued when the baggage was received in this case. When the amendment was passed Congress well knew that baggage was not carried upon bills of lading, and that carriers had been accustomed to issue checks upon receipt of baggage. We do not think it was intended to require a departure from this practice when the matter was placed under regulation by schedules filed and subject to change for unreasonableness upon application to the Commission. Such checks are receipts, and there is no special requirement in the statute as to their form. It is doubtless in the power of the Interstate Commerce Commission to make requirements as to the checks or receipts to be given for baggage if that subject needs regulation. Act of June 18, 1910, §§ 1 and 15, c. 309, 36 Stat. 539.

Reversed and remanded to the Superior Court of Massachusetts for further proceedings not inconsistent with this opinion.

MR. JUSTICE PITNEY, dissenting.

GEORGE N. PIERCE CO. v. WELLS, FARGO & CO.

SUPREME COURT OF THE UNITED STATES, 1915.

[236 U. S. 278.]

This action was begun in the Circuit Court of the United States for the Western District of New York, to recover \$20,000 for the loss of certain automobiles, shipped for the petitioner, hereinafter called the Automobile Company, by the respondent, hereinafter called the Ex-

press Company. The automobiles were shipped under circumstances to be detailed later, and the recovery of their value was sought for a breach of the contract to carry safely; failure to deliver according to the contract; for negligence; and for breach of the duty imposed upon the initial carrier by section 20 of the Act to Regulate Commerce, the Carmack Amendment (Act of June 29, 1906, c. 3591, 34 Stat. 584). The automobiles were shipped and receipt was issued in the form usually used by the express companies and containing the clause "Nor in any event shall said Company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued unless a different value is hereinabove stated." The receipt is in the form of the one shown in *Adams Express Co. v. Croninger*, 226 U. S. 491, and is identical in form with the one involved in the case of *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469.

At the trial, the tariff-book of the Express Company was marked for identification, but does not appear to have been embodied in the record. Counsel for the petitioner has, since the argument, filed a memorandum in explanation of the tariffs of the Express Company, and giving extracts therefrom, from which it appears that the rate for uncrated automobiles is double the merchandise rate, and that a through rate could be made by combination of rates from the point of shipment to the basing point, thence to destination. The rates filed, according to the memorandum, show merchandise rate from Chicago, as a basing point, to Buffalo, whence the goods were shipped, and shows merchandise rate, California section, page 20, from Chicago to San Francisco, and double the merchandise rate from Chicago to Buffalo, Chicago to San Francisco, would be \$26.50 per hundred pounds, or, using Kansas City as a basing point, taking the rates from Kansas City to Buffalo, Kansas City to San Francisco, the doubled rate would be the same amount per hundred pounds; also a valuation tariff, showing an additional charge for value in excess of \$50, on rate of \$8 per hundred pounds or over, 20 cents per hundred pounds, and, as the memorandum shows, if the value of the shipment may be taken to be \$15,487.06, the rate for that sum in excess of \$50 would be \$31.

The Automobile Company was engaged in Buffalo in the manufacture, sale and shipment of automobiles. It had frequently made use of the services of the Express Company, knew its course of business, had a copy of its tariffs and a book of its express receipts and was familiar with the same; that is, it knew of the filed rate based upon weight or volume and the primary statement of value and consequent limitation upon the right to recover, as well as of the existence of a right to declare additional value and secure in case of loss an additional amount of recovery. Indeed, the Automobile Company had frequently resorted to the method of making a declaration of increased value in order to secure an increased amount of recovery under the tariff.

In May, 1907, the Automobile Company requested the Express

Company to furnish an express car for the shipment of a carload of automobiles to San Francisco. Negotiations followed between the officers of the two companies and an understanding was reached. An express car was furnished and put as requested by the Automobile Company upon a sidetrack where it could be by that company conveniently loaded. Four automobiles were then moved by their own power to the place of loading and together with an extra automobile body and other automobile parts were loaded in the car by the shipper. When the car was loaded, triplicate receipts on the form usually used by the Express Company were made out and handed to the agent of the Automobile Company, who read them, observed the absence of declaration of value and the limitation of \$50, and said they were satisfactory. Before the shipment moved, the agent of the Express Company again called the attention of the agent of the shipper to the absence of declared valuation, inquired whether such declaration had been intentionally omitted and whether the property was insured, and was told that the omission was intentional and that the property was insured. Indeed it was shown beyond dispute that the failure to declare an additional value was the result of a change in the method of shipping its goods which had been shortly before put in practice by the Automobile Company, and that in this particular case the additional value was not declared because the shipment had been ordered from San Francisco, and the primary rate, that is the one shown by the tariff on weight or volume based upon the primary value, had been designated from San Francisco as the rate under which the goods should be carried. The car moved toward its destination but never reached there because while in transit on the rails of the Santa Fe Railway in the State of Missouri it was destroyed by fire.

This suit was then brought by the Automobile Company against the Express Company and the Santa Fe Railway to recover \$20,000, the alleged value of the automobiles. The suit as to the Santa Fe Railway was dismissed for want of service and the case was tried only against the Express Company. As the case went to the jury, there was no denial of some liability on the part of the Express Company, the issue being whether its responsibility was limited to the sum of \$50, the value of the automobiles as stated in the shipping receipt, which was in accordance with the published and filed tariff, or embraced the actual value of the things shipped. The trial court sustained the limitation in the receipt and directed a verdict for the \$50 only, and after the affirmance by the Circuit Court of Appeals of the Second Circuit of the judgment of the trial court entered on such instructed verdict (189 Fed. Rep. 561), the writ of certiorari which brings the case before us was granted.

The case as made therefore presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to \$50, which

is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property.

That contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence (*Railroad Company v. Lockwood*, 17 Wall. 357, 375) was settled by this court in what is known as the Hart Case (*Hart v. Pennsylvania R. R.*), 112 U. S. 331. In that case a recovery limited to \$1,200 for 6 horses, one shown to be worth \$15,000 and the others from \$3,000 to \$3,500 each, was sustained upon the principle that the contract did not relieve against the carrier's negligence, but limited the amount that might be recovered for such negligence, and it was there held that such contracts when fairly made did not contravene public policy. That case has been frequently followed since and its doctrine applied in construing limited liability contracts in connection with the Carmack Amendment to the Interstate Commerce Act, in a series of cases beginning with the *Adams Express Co. v. Croninger*, 226 U. S. 491. See in this connection *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469; *Kansas Southern Railway v. Carl*, 227 U. S. 639; *M., K. & T. Ry. v. Harriman*, 227 U. S. 657; *Chicago, Rock Island & Pacific v. Cramer*, 232 U. S. 490; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97; *A., T. & S. F. Ry. v. Robinson*, 233 U. S. 173.

The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arms' length, and for the purpose, so far as the shipper was concerned, of securing the lower rate, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate.

Since the Act to Regulate Commerce and its amendments have gone into effect, cases of this character must be decided in view of the provisions of the Commerce Act and its requirement that the carrier shall file its tariffs and rates which shall be open to inspection and shall prescribe rates applicable to all shippers alike, thus to effect one of the main purposes of the law often declared by this court, to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances. As this court said in one of the earlier cases, considering the limited liability contracts in connection with the provisions of the Interstate Commerce Act (*Kansas Southern Railway v. Carl*, 227 U. S. 639, 652):

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. . . . To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain

a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse."

But it is said, and this fact was the basis of the dissenting opinion in the Circuit Court of Appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped, — about \$15,000, — and \$50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. None such was attempted in the Neiman-Marcus Case, the Croninger Case, or the Hooker Case. But the contract embodied in the receipt was sustained in the Express Company Cases, because of the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby. In each of those cases the filed tariff showed an opportunity to the shipper to have a recovery in a greater value than was declared, thus making it optional with the shipper to ship at the lower rate and not to avail himself of the right to greater recovery upon paying the higher rate named in the tariff. As the cases cited have held, so long as the tariff rate remains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties. *Great Northern Ry. v. O'Connor*, 232 U. S. 508; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 121.

If the rates were unreasonable it is for the Commission to correct them upon proper proceedings. If this were not so, the Interstate Commerce Act would fail to make effectual one of its prime objects, the prevention of discrimination among shippers. So long as the tariffs are adhered to, shippers under the same circumstances are treated alike.

Since the cause of action in this case arose, the Interstate Commerce Commission has dealt with this subject (*The Matter of Express Rates*, 28 I. C. C. 131), and the fifty-dollar limitation and the classification based upon the valuation not exceeding \$50 has been made applicable only to shipments weighing not more than 100 pounds. (28 I. C. C. 137, 138.) Under that weight the recovery is still limited to the sum of \$50 unless a greater value is declared at the time of shipment, and the declared value in excess of the value specified paid for, or agreed to be paid for, under the schedule of charges for excess value. The limitation in the tariffs of \$50 was made in view of the great mass of

merchandise of moderate value in shipments received by the company, and for that reason has been permitted in modified form to remain in the published tariffs by the action of the Interstate Commerce Commission in the matter to which we have referred.

In the O'Connor Case (232 U. S. 508) and the Robinson Case (233 U. S. 173), above cited, the doctrine of the conclusiveness of the filed rates was said to have no application to attempted fraudulent acts or false billing. We do not perceive how this doctrine can be applicable to the present case. As the statement of facts shows, the transaction was open and above board, the character of the goods was plainly disclosed and known to both parties, and the rate paid was not attempted to be fixed upon actual value alone, but upon a value which the shipper was competent to agree to, in consideration of the lower rate. Indeed, if a recovery for full value was to be permitted in this case, the shipper itself would obtain an undue advantage in recovering such value, when it had purposely and intentionally taken the risk of less responsibility from the carrier, for a lower rate. Such result would bring about the very favoritism which it is the purpose of the Commerce Act to avoid.

The suggestion that there is a wrong to other shippers, who value their goods at their real worth, is answered by the fact that this tariff was open to all under the same circumstances, and while it remained in force, any shipper who wished to take the risk of a recovery for very much less than the value of his goods might have the benefit of the shipment at the reduced rate. The contention that the carrier should have been held to account for the value of what was left of the automobiles after the wreck and fire does not seem to be presented by the pleadings and was not involved in the disposition of the case ultimately made upon the contract of shipment. We find no error in the court's withholding that issue from the jury in the condition of the record.

Finding no error in the judgment of the Circuit Court of Appeals, it is

Affirmed.

MR. JUSTICE PITNEY dissenting.

SHAWNEE MILLING CO. v. POSTAL TELEGRAPH-CABLE CO.

SUPREME COURT OF KANSAS, 1917.

[Reported 101 Kan. 307.]

The opinion of the court was delivered by DAWSON, J.:

The plaintiff recovered a judgment for damages against the defendant for an error in the transmission of a telegram delivered orally by telephone for forwarding to a firm of grain dealers in Wichita. The telegram was partly in code. It reads:

"TOPEKA, KANSAS, August 7, 1914.

"*Wagner Grain Co., Wichita, Kansas.*

"Perfume have booked fluting accursed debating Kansas City basis boundary.
"SHAWNEE MILG. Co."

The telegram was an acceptance of an offer of ten thousand bushels of wheat. The code word for such a purchase was "fluting." It was erroneously transmitted to read "flirting," which meant six thousand bushels. The more or less proximate consequences of this error occasioned this lawsuit.

One of the defences of the telegraph company was that the telegraphic message was received for transmission as an unrepeatable telegram, and that the terms and conditions for the receipt and transmission of such messages were those set forth on its regular blank forms for telegrams, parts of which read:

THE POSTAL TELEGRAPH-CABLE COMPANY

(Incorporated.)

"Transmits and delivers the within telegram subject to the following terms and conditions:

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED; that is telegraphed back to the originating office for comparison. For this, one-half the unrepeatable telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, UNLESS SPECIALLY VALUED; nor in any case for delays arising from unavoidable interruption in the working of its lines; NOR FOR ERRORS IN CIPHER OR OBSCURE TELEGRAMS."

It will thus be seen that the telegraph company has two principal schedules of rates — one for unrepeatable messages in which its liability for errors in transmission was limited to the amount received by it for sending the message, and a rate fifty per cent higher for repeated messages in which its liability for erroneous transmission was stipulated in advance to be fifty times the sum paid for the service. These rates must be filed with the public utilities commission and may not be departed from by the telegraph company without the assent of that tribunal; and all discrimination and preferences in rates or service is forbidden by the public utilities act. (Laws 1911, ch. 238, §§ 3, 10-12, 20, 30, Gen. Stat. 1915, §§ 8329, 8337-8339, 8347, 8358.) The service performed by the defendant must be held to have been in pursuance of its regular corporate business, and it should be assumed that no discriminatory or preferential service was being extended to plaintiff when the defendant received plaintiff's message by telephone for transmission to Wichita. It must be considered

as if the plaintiff had formally written the message in the usual way on regular blanks furnished by the company. That telegraph companies frequently accept messages by dictation over a telephone is well known. It would be harsh to say that any illegal preference forbidden by section 8401 of the General Statutes of 1915 is intended in so doing. Nor would it be just to hold that in extending this apparently harmless courtesy the telegraph company thereby places itself in a less favorable position or assumes a greater responsibility than it does when it receives for transmission telegrams written in the usual way with the usual conditions attached. Nevertheless, if this practice is to be regarded as a general one, carrying a different rate or subjecting the telegraph company to a different degree of responsibility, a uniform schedule of rates and charges for such service and the regulations pertinent thereto should be filed with the public utilities commission and subject to its approval; and such rates and service are invalid until they are so filed; and when formally promulgated they may not be departed from with impunity. (Gen. Stat. 1915, §§ 8398, 8400, 8416; *The State, ex rel., v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544; *Mollohan v. Railway Co.*, 97 Kan. 51, 154 Pac. 248.)

The court is of opinion that in the absence of a distinct schedule of rates applying to telegrams delivered for transmission by telephone, the case is governed by the conditions attaching to the usual and more formal mode of transacting its corporate business.

The telegraph company is liable, if at all, according to the terms of its contract of service, unless that contract is an unreasonable limitation of its liability for negligence. It was pleaded that the message was received for transmission as an unrepeatd message. The plaintiff's general denial traversed this as well as the other allegations of the answer, but there is seemingly no contention that the case should turn upon whether the telegram was to be transmitted as a repeated or an unrepeatd message, nor is it intimated that it was transmitted as a repeated message "specially valued" according to the rates and terms for transmission of such messages.

SECTION III. EXCUSES.

COLT v. M'MECHEN.

SUPREME COURT, NEW YORK, 1810.

[6 *Johns.* 160.]

SPENCER, J. The plaintiffs have moved for a new trial on two grounds; 1st. For a misdirection to the jury, in stating that the failure of the wind was the act of God; and, 2d. For that the verdict

was against evidence, on the point submitted to the jury, in relation to the negligence or carelessness of the master of the sloop, after she struck.

There can be no contrariety of opinion, on the law which renders common carriers liable. However rigid the rule may be, they are responsible for every injury done to goods entrusted to them to carry, unless it proceeds from the act of God, or the enemies of the land. What shall be considered the act of God, as contradistinguished from an act resulting from human means, affords the only difficulty in the case.

The cause was summed up to the jury on this point, "that if they were satisfied from the whole evidence, that the vessel ran ashore in consequence of the sudden failure of the wind, the law would consider it as the act of God, and exculpate the defendant." By finding a verdict for the defendant, the jury have believed the testimony of Captain M'Kean, and the other witnesses produced by the defendant, in their account of the manner and circumstances under which the vessel grounded. The substance of that testimony is, that the vessel being on her passage from New York to Kinderhook, late in the month of November, 1800, proceeded on the passage to West-Camp, where the vessel came to, from thence they weighed anchor and beat against the wind; from the lateness of the season, and for fear of ice, the captain was anxious to make Livingston's dock, which was considered a place of safety, and at which they had nearly arrived, when the accident happened; that the wind was light and variable, but sufficient to enable them to make considerable progress, and would have been sufficient, if it had continued, to have enabled them to have reached the dock, in a few more tacks; they were standing for the west shore, and had approached it, as near as was usual and proper, when they put down the helm to bring her about, the jib sail began to fill, the vessel partly changed her tack, when the wind suddenly ceased blowing, and the headway, under which the vessel was, shot her on the bank. Captain M'Kean states, that he was well acquainted with the shore, and had before approached as near as he did then, when beating to windward; and that, when standing for the west shore, he had wind enough to enable him to manage the vessel with safety; that as the water fell, the stern of the sloop settled, and did not rise until flood tide, in consequence of which, the water rushed in at the windows, and thereby the plaintiff's goods were wet and damaged. He states, distinctly, that the sudden and entire failure of the wind was the sole cause of the vessel's grounding.

The case of *Amies v. Stevens* (1 Str. 128) shows that a sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier and upset, by the violence of the shock, has been adjudged to be the act of God, or *vis divina*. The sudden gust, in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the

acts of God. He caused the gust to blow in the one case; and in the other, the wind was stayed by him.

It has been said, that the captain was guilty of negligence in attempting to beat, and in approaching the shore as near as he did when the disaster happened, the wind being, as he states, light and variable. It may be observed, that the master had his choice of alternatives, either to improve the wind he then had, in order to reach a place of safety, or to be exposed in the middle of the river, to the effects of ice. The season of the year, and the interests of all concerned, justified the captain in attempting to reach Livingston's dock. It was not, as I recollect, pretended, on the trial, that his conduct was improper and unusual, in approaching the shore as near as he did on the tack in which the vessel grounded; at all events, the case does not show that the judge expressed any opinion on that point; and the plaintiff must have had the full benefit of that objection to the captain's conduct. I should undoubtedly have been of opinion, as the captain was situated, taking into view the lateness of the season, the narrowness of the channel, and the fact, that he was not nearer the shore than is usual and customary in beating, that he was not guilty of negligence or improper conduct in that respect.

No rule of law having been violated, in the charge to the jury if there even were grounds for saying that there is some degree of negligence imputable to the master, that point has been under the consideration of the jury, or it was not insisted on before them, and in either case, when the plaintiffs attempt to fix the defendant with a loss from a very rigid rule of law, I should not disturb the verdict of a jury, to give them another opportunity to urge that objection. In the case of the *Proprietors of the Trent Navigation v. Wood*, the vessel was sunk, by driving against an anchor, in the river Humber, and the goods were considerably damaged by the accident; it was not pretended by the counsel, that this was the act of God, and Lord Mansfield considered it the injury of a private man, within the reason of the instance of robbery. Abbott, in his notice of this case, (Abbott, 256,) observes, that both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it; as when he saw the vessel in the river, he must have known that there was an anchor near at hand; or if it was to be taken, that negligence was imputable only to the master, who had left his anchor without a buoy, that he was answerable over to the master and owners of the vessel, whose cargo had been injured. Again, he observes, (p. 227) that if a ship is forced on a rock or shallow, by adverse winds, or tempests, or if the shallow was occasioned by a recent collection of sand, where ships could before sail with safety, the loss is to be attributed to the act of God, or the perils of the sea. Upon a position so plain, in my apprehension, as that the sudden cessation of a wind which was competent, at the very moment when the vessel began to come about, for the avoidance of the shoal, was the act of God, and did not

arise from the fault or negligence of man, I am at a loss for further illustration.

The second point, on which a new trial is sought, was fairly and fully before the jury; and without entering upon it further, I cannot but express my perfect concurrence in opinion with them; the master did everything which could reasonably be expected of him, to prevent the vessel from sinking. Accordingly, my opinion is against a new trial.

THOMPSON, J. VAN NESS, J. and YATES, J. concurred.

KENT, Ch. J. I concur in the general doctrine, that the sudden failure of the wind was an act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence. But I think here was a degree of negligence, imputable to the master, in sailing so near the shore under a "light variable wind." that a failure in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity. (*Trent Navigation v. Wood*, 3 Esp. N. P. 127.) A *casus fortuitus* was defined in the civil law to be, *quod fato contingit, cuius diligentissimo possit contingere*. But as this point does not appear to have been particularly urged at the trial, and the verdict negatives the charge of negligence: and as the responsibility of common carriers may be deemed sufficiently strict, I am content not to interfere with the verdict, though I think that the evidence would have warranted the conclusion of negligence to a certain extent.

Judgment for the defendant.

OAKLEY v. PORTSMOUTH AND RYDE STEAM PACKET CO.

EXCHEQUER, 1856.

[11 Ex 168.]

THIS was an appeal against the decision of the Judge of the County Court of Hampshire holden at Portsmouth.

The action was brought to recover £29 12s. 6d., for damage done to certain goods and merchandise of the plaintiff in a boat belonging to the defendants, under the following circumstances:—

The plaintiff is a railway carrier living in the Isle of Wight. The defendants run their packets between Portsmouth and Ryde. The plaintiff had a contract with the defendants, who are common carriers, for the conveyance of his goods and parcels in the horse or tow-boats of the defendants between Gosport and Ryde. The goods damaged were, on the 31st October, 1853, put in a boat of the defendants', which was taken in tow by a steamer belonging to the defendants, called the "Prince of Wales."

The damage complained of occurred on that day. It was a boisterous day; a good deal of sea was running; a strong ebb-tide was running out of Portsmouth harbor against the wind. The "Prince of Wales," with the plaintiff's boat in tow, as usual, was going out of Portsmouth harbor from Gosport towards Victoria Pier at Portsmouth, where the vessels always stop to take in passengers. Another steamer, the "Princess Royal," (also belonging to the defendants), which had just arrived from Ryde, was alongside the pier. As the most convenient practice, the steamboat approaching the pier usually stopped until the other had left the pier. On this occasion the "Prince of Wales," with the boat in tow, was stopped twice in consequence of the steamer at the pier being stopped after she had been started. On the stopping of the "Prince of Wales" the second time, the tide lifted up the towed boat and pitched it on the rudder of the "Prince of Wales," and stove in some of the bottom timbers of the towed boat, and thus sprung a leak in the towed boat, which was let go and got to shore as speedily as possible, and some of the goods were found to be damaged.

The course taken by the captain of the "Prince of Wales" in stopping his vessel was not taken to avoid a collision with the other vessel at the pier, but as the usual, and, in his judgment, a safe course to reach the pier on the other vessel leaving it. If the "Prince of Wales" had continued in motion, the towed boat would not have been thrown on the rudder nor the damage done; but the "Prince of Wales" would have lost a good deal of time, and the state of the wind and tide might have swamped the towed boat if the "Prince of Wales" had, from the point where the steamer was observed to be at the pier, gone further out to sea. The men in the towed boat used every effort to fend her off the vessel. The "Prince of Wales" was stationary when the boat struck against the rudder. There was nothing unusual in the state of the wind or tide, nor anything therein that was not known to the captain of the "Prince of Wales" at the time he started from Gosport; to whom it was also known that the "Princess Royal" would probably be at the Portsmouth pier when he arrived off it. There was no negligence, in fact, on the part of the captain of the "Prince of Wales," or on the part of the captain of the "Princess Royal."

On the part of the defendants it was contended, that, under the above circumstances, they were not liable for the damage done to the plaintiff's goods. The judge of the county court decided that the plaintiff was entitled to recover.

The point for the consideration of the Court is, whether, under the circumstances before stated, the damages are recoverable from the defendants.

Hayes for the appellants. — The defendants are not liable, inasmuch as the damage was caused by the act of God. The responsibility of a carrier was considered in *Forward v. Pittard*, 1 T. R. 27, where Lord *Mansfield*, in delivering the judgment of the Court, says, "By the common law, a carrier is in the nature of an *insurer*. It is laid down that

he is liable for every accident except the act of God or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempest." Again, in the case of *The Company of the Trent Navigation v. Wood*, E. T. 25 Geo. 3, B. R., cited in 1 T. R. 28, Lord *Mansfield* said, "By the act of God is meant a natural, not merely an inevitable accident." [*Alderson*, B. — Suppose a person is taken to a hospital where an infectious disease prevails, and he catches it, would that be the act of God?] There the injury might have been avoided: here the damage would not have arisen but for the wind and waves. [*Martin*, B. — Suppose on a stormy day the wind drove one vessel against another without any negligence of the captains of either vessel, would that be the act of God?] It would, since it was an accident arising from natural causes. In *Amies v. Stevens*, 1 Str. 127, the defendant's hoy loaded with the plaintiff's goods, in coming through a bridge, was driven by a sudden gust of wind against it, and sunk in consequence of a shock, which a stronger vessel might have sustained without sinking. *Pratt*, C. J., "held the defendant not answerable, the damage being occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this, being only a sudden gust of wind, had entirely differed the case; and no carrier is obliged to have a new carriage for every journey." In *Abbott on Shipping*, p. 314, 9th edit., it is said, "The expression 'act of God' denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the negligence of man." A similar definition is given in *Story on Bailments*, § 523; and amongst other instances, reference is made to a case of *Colt v. M'Meehan*, 6 Johns. R. 160, where a vessel was beating up the Hudson against a light and variable wind, and being near shore and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; and that was held a loss by the act of God. [*Martin*, B. — The case finds that there was nothing unusual in the state of the wind or tide.] Weather which would not be tempestuous for one vessel might be tempestuous for another. Again, at what particular point does a tempest begin? The true criterion is, whether the damage has arisen from natural causes and without any negligence on the part of the carrier. [*Alderson*, B. — Suppose a carrier was passing a powder mill and it blew up, or was going over a bridge and it fell down, and thereby the goods were damaged, would he not be liable?]¹

ALDERSON, B. — We are all satisfied that this damage did not arise from the act of God.

¹ Argument for the respondent is omitted. — ED.

MARTIN, B. — The act of God means something overwhelming, and not merely an accidental circumstance. Here the rising of the waves dashed the boat on the rudder of the steam-vessel, but that was caused by the stopping of the steam-vessel. *Appeal dismissed.*

PLATT, B. concurred.

MERRITT v. EARLE.

COURT OF APPEALS, NEW YORK, 1864.

[29 N. Y. 115.]

THIS action was against the defendant as the owner of the steamboat Knickerbocker, to recover the value of a span of horses belonging to the plaintiff, which were lost while being transported from Albany to New York, by the sinking of the vessel in the Hudson river.

It was admitted by the defendant in his answer, that on or about the 1st of September, 1856, he was the owner of the steamboat Knickerbocker, and that he used the same for the transportation of freight and of passengers for hire, as a public employment and as a common carrier between the cities of Albany and New York, on the waters of the Hudson river. On the trial before Mr. Justice EMORY, at the Westchester Circuit, in September, 1858, it appeared that the plaintiff had purchased a pair of horses at Syracuse, and reached Albany with them by railroad on Sunday, the 31st of August, 1856, and on the afternoon of that day they were received on board the steamboat for transportation to New York. The plaintiff paid the freight of the horses to New York, and also took passage himself. The boat left Albany for New York on Sunday evening, and about two or three o'clock on the following morning, she ran upon the mast of a sunken vessel near Buttermilk Falls and sunk, and the plaintiff's horses were drowned. They were of the value of \$450.

The defence was that the horses were lost by inevitable accident, and that the contract for transportation having been made on Sunday, was void, and the plaintiff could not recover.

The defendant gave evidence tending to show that the officer in charge of the boat did not know or discover that there was any obstruction in the river. It appeared, however, that the sloop sunk in a squall on the preceding Friday, owing to the neglect of the crew to lower its sails in season, and her mast was, at low water, fifteen or sixteen feet out of water. It was also visible on Saturday and Sunday.

At the close of the evidence the counsel for the defendant requested the judge to instruct the jury that the plaintiff was not entitled to recover, for the reason that the loss was occasioned by an inevitable accident, against which the defendant could not have guarded by the exercise of due diligence and precaution; and because the contract

was void under the statute relating to the observance of Sunday. The judge refused so to decide, but directed a verdict in favor of the plaintiff, and the defendant excepted.

Judgment being entered, the defendant appealed to the supreme court, where the same was affirmed. He now appeals to this court.

WRIGHT, J. There was no controversy as to the nature of the accident, or how it occurred, which caused the loss of the plaintiff's horses. On the Friday preceding the downward trip of the defendant's steamer a sloop had been sunk, in a squall of wind, near Buttermilk Falls, and about in the usual route on the downward passage of steamboats navigating the river. The defendant's steamer ran upon the mast of this sunken vessel, which stove in her bottom, and she was cast away, and sunk in the water to her promenade deck in consequence. The defendant assumed this to be an inevitable accident, against which he could not have guarded by the exercise of due diligence and precaution; and, as matter of law, that it excused him from liability as a carrier. This presents one of the two questions raised by the exceptions in the case.

The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses. The expressions "act of God" and "inevitable accident" have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an "inevitable accident" which no foresight or precaution of the carrier could prevent; but the phrase "act of God" denotes natural accidents that could not happen by the intervention of man — as storms, lightning, and tempest. The expression excludes all human agency. In the case of the *Trent Proprietors v. Wood* (4 Douglass, 287), Lord Mansfield said: "The general principle is clear. The act of God is natural necessity — as winds and storms — which arise from natural causes, and is distinct from inevitable accident." The same judge, in *Forward v. Pittard* (1 Term Rep. 27), defined the "act of God" to be something in opposition to the act of man — adding "that the law presumes against the carrier unless he shows it was done by such an act as could not happen by the intervention of man — as storms, lightning, and tempest."

Another principle running through the case is, that to excuse the carrier the act of God must be the sole and immediate cause of the loss. That it is the remote cause is not enough. This is illustrated in the case of *Smith v. Shepherd* reported in *Abbot on Shipping* (part 3, ch. 4, § 1); and *McArthur v. Sears* (21 Wend. 190). In neither of the cases was the loss occasioned directly by natural violence, although a sudden and extraordinary flood in the one case, and a light on board a steamer which had grounded in a previous gale of wind in the other, were the remote causes. In *Smith v. Shepherd*, the vessel was lost by striking a floating mast attached to a vessel which had been sunk by

getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank, altered suddenly by the flood, and was wrecked. The flood which changed the bank was the ultimate occasion of the misfortune; but it was held to be too remote. The vessel had not been forced on the bank by winds or other extraordinary violence of nature, or without human interference. The immediate cause of the loss was the coming in collision with a floating mast which some person had attached to the sunken vessel. In *McArthur v. Sears*, the vessel was lost in attempting to enter port by mistaking a light on board of a steamer which had grounded in a previous gale of wind for one or two beacon lights of the port. One of the beacon lights, through some neglect, was not burning, and the light on board of the wrecked steamer was easily mistaken for it. It was a dark night, the snow was falling, and there was a considerable wind. The mistake occasioned the loss of the vessel without any fault of her master or crew, yet it was held that the carrier was not excused.

In the present case the sinking of the defendant's vessel was not directly caused by the act of God. The immediate cause was her running upon the mast of a sloop that had been sunk in a squall of wind a day or two previously. She was not forced upon the mast which stove in her bottom by the wind or current, and although the sloop may have been sunk by the violence of the wind, yet that was but the remote cause of the loss of the defendant's steamer. The case of *Smith v. Shepherd*, in its circumstances, closely resembles the present one. In that case the defendant's vessel ran against a floating mast attached to a vessel which had been sunk by getting on a bank suddenly changed and made dangerous by a flood, and was forced by the mast upon the changed bank and wrecked. In this case the defendant's vessel ran against the mast of a sloop that had been sunk in a sudden and violent squall of wind. In the former case, the changing of the bank was the "act of God," as spoken of in the law of carriers. So in this case the sinking of the sloop was occasioned by what may be properly called the "act of God." But neither the changing of the bank by the flood, nor the sinking of the sloop by the sudden and violent squall, was alone the cause of the loss of the defendant's vessel. Human agency intervened in the one case, by attaching to the sunken vessel the floating mast with which the lost vessel came in contact; and in this other, by placing the sloop in the position in which she was overtaken by the wind. All the cases agree that by the expression "act of God," is meant something which operates without any aid or interference from man; and when the loss is occasioned, or is the result in any degree of human aid or interference, the case does not fall within the exception to the carrier's liability. I am of the opinion, therefore, that had the defendant shown that the plaintiff's loss was occasioned by an accident, against which he could not have guarded

by the exercise of due diligence and precaution, it would not have absolved him from his responsibility as a carrier.¹

BOHANNAN *v.* HAMMOND.

SUPREME COURT OF CALIFORNIA, 1871.

[42 Cal. 227.]

TEMPLE, J. In this case there is no brief on file on the part of the respondent, although there is on file what purports to be a reply to respondent's brief. We are therefore compelled to investigate the case without the assistance of counsel, so far as respondent is concerned.

The complaint charges that defendant is a common carrier, and as such undertook to carry for plaintiff twenty-one tons of wheat from the City of Stockton to San Francisco; that the wheat was delivered to the defendant and received by him, but was, while in transitu, damaged through the fault of defendant. To recover this damage is the object of this suit. The answer admits that the defendant was a common carrier. The contract and the loss were proven substantially as alleged. This appeal is by the defendant from a judgment in favor of plaintiff, and from an order denying a new trial.

The defendant contends that the Court has no jurisdiction, because the action arises upon a maritime contract, and is cognizable in admiralty. This position is manifestly untenable. The Judiciary Act, which defines the jurisdiction of the District Courts of the United States, and confers upon them admiralty jurisdiction, secures to suitors a common law remedy, where the common law is competent to give it. It has been repeatedly held that the State Courts have concurrent jurisdiction of causes of action cognizable in admiralty where only a common law remedy is sought.

The vessel of the defendant, at the time of the loss, was moored at the wharf at the City of Stockton, where vessels usually lie while loading and unloading. But a portion of plaintiff's wheat had been taken on board, when the tide receding left the vessel upon the mud in the slough. There happened to be under the vessel a piece of cordwood which was pressed down into the mud, but which, owing to the weight of the vessel, punched a hole in the bottom of the vessel, which caused it to fill with water, and hence the loss.

The Court finds, that the damage was occasioned by a large piece of cordwood, which had sunk to the bottom of the place where the vessel lay; but whether it came to lie there accidentally, or had been placed there by some person, the Court was unable to determine. The parties were both ignorant of its being there, until after the damage had been done; that at the time of the injury the defendant's vessel was strong

¹Part of the opinion, discussing another point, and the concurring opinion of JOHNSON, J. are omitted.—ED.

and in good condition and sufficient to have safely carried the plaintiff's goods, but for the accident.

Under these circumstances there can be no doubt of the liability of the defendant. A common carrier is not only responsible for negligence, but is an insurer against any loss not occasioned by act of God, the public enemies, or the fault of the party suffering the loss. When loss occurs the burden of proof is upon the carrier, to show that it resulted from one or the other of these excepted cases.

It is not necessary to decide whether defendant would have been liable, had it appeared that the stick of wood had sunk to its place without the interposition of the agency of man. The falling of the tide, leaving the vessel upon the bottom of the slough, must have been anticipated. There was no sudden, unlooked-for physical event, against which no prudence could guard. It does not appear that the vessel could not have been so moored that it would not have been left aground when the tide receded. It may be claimed, with some degree of plausibility, that the defendant would be liable for want of proper care.¹

Judgment and order affirmed.

NUGENT v. SMITH.

COURT OF APPEAL, 1876.

[1 C. P. D. 423.]

COCKBURN, C. J.² This case involves a question of considerable importance as regards the law relating to carriers by sea, but the facts are few and simple. The plaintiff, being the owner of two horses, and having occasion to send them from London to Aberdeen, shipped them on board a steamship belonging to the company of which the defendant is the representative, plying regularly as a general ship between the two ports. The horses were shipped without any bill of lading. In the course of the voyage a storm of more than ordinary violence arose; and partly from the rolling of the vessel in the heavy sea, partly from struggling caused by excessive fright, one of the animals, a mare, received injuries from which she died. It is to recover damages in respect of her loss that this action is brought.

The jury, in answer to a question specifically put to them, have expressly negatived any want of due care on the part of the defendant, either in taking proper measures beforehand to protect the horses from the effects of tempestuous weather, or in doing all that could be done to save them from the consequences of it after it had come on. A further question put to the jury was, whether there were any known means, though not ordinarily used in the conveyance of horses by

¹ *Acc.* New Brunswick S. B. & C. T. Co. v. Tiers, 24 N. J. L. 697. And see *Packard v. Taylor*, 35 Ark. 402. — *Ed.*

² Part of this opinion and the concurring opinions of Mellish, L. J. and Cleasby, B. are omitted. — *Ed.*

people of ordinary care and skill, by which the defendant could have prevented the injury to the mare, but to this question the jury returned no answer. The question is, whether, on this state of facts, the ship-owners are liable.

For the defendant, it was insisted that the storm, which was the primary, and in a partial degree the proximate, cause of the loss, must be taken to have been an "act of God" within the legal meaning of that term, so as, all due care having been taken to convey the mare safely, to afford immunity to the defendant's company as carriers from liability in respect of the loss complained of; and the question to be determined is, whether this contention is well founded.

But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision really turns, namely, whether the loss was occasioned by what can properly be called the "act of God."

The definition which is given by Mr. Justice Brett, of what is termed in our law the "act of God" is, that it must be such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. The judgment then proceeds: "We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred."

The exposition here given appears to me too wide as regards the degree of care required of the shipowner, and as exacting more than can properly be expected of him. It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavor to lay down an intelligible rule.

That a storm at sea is included in the term "act of God," can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis major* coming under the denomination of "act of God." But it is equally true, as has already been pointed out, that it is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end.

It is at once obvious, as was pointed out by Lord Mansfield in *Forward v. Pittard*, 1 T. R. 27, that all causes of inevitable accident—

casus fortuitus — may be divided into two classes — those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term “act of God” to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term “act of God” is properly applicable.

On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the “act of God,” that it necessarily follows that the carrier is entitled to immunity. The rain which fertilizes the earth and the wind which enables the ship to navigate the ocean are as much within the term “act of God” as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided; or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only, as has been observed, has there been no judicial exposition of the meaning of the term “act of God” as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, but the text-writers, both English and American, are, for the most part, silent on the subject and afford little or no assistance. Being here, however, on common ground with the civilians, so far as one head of inevitable accident is concerned, it may be of use, while endeavoring more clearly to fix the limits of that class of inevitable accidents which comes under the head of “act of God,” to turn to their views on the subject with reference to inevitable accidents in general. As the result of the different instances of *casus fortuitus*

which occur in the Digest, Vinnius gives the following definition: "Casum fortuitum definimus omne quod humano ceptu prævideri non potest, nec cui proviso potest resisti" (Partit. Juris. lib. ii. c. 66). He enumerates various instances: "Casus fortuiti varii sunt: veluti a ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigoris, et similium calamitatum quæ cœlitus immittuntur. Nostri vim divinam dixerunt. Græci, θεοῦ βίαι. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incur-sus hostium, prædonum impetus. His adde damna omnia a privatis illata, quæ quominus inferrentur nullâ curâ caveri potest." Baldus (Quæst. 12, no. 4) gives the following definition: "Casus fortuitus est accidens, quod per custodiam, curam, vel diligentiam mentis humanæ non potest evitari ab eo qui patitur."

In our own law on this subject judicial authority, as has been stated, is wanting, and the text writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are of course included, and consequently to a great extent the instances of inevitable accident at sea which come under the term "act of God," uses the following language: "The phrase 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." Story on Bailments, 512. Story, it will be observed, here speaks only of "ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence." In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of "acts of God." In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him: and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such vis major as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because

it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the *vis major* must be such as "no amount of human care or skill could have resisted," or the injury such as "no human ability could have prevented," and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare is, I think, involved in the finding of the jury, directly negating negligence, and I think that it was not incumbent on the defendants to establish more than is implied by that finding.

The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright, leaving it doubtful whether the fright was the natural effect of the storm or whether it arose from an unusual degree of timidity peculiar to the animal and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma: if the fright which led to the struggling of the mare was in excess of what is usual in horses on shipboard in a storm, then the rule applies that the carrier is not liable where the thing carried perishes or sustains damage, without any fault of his, by reason of some quality inherent in its nature, and which it was not possible for him to guard against. If, on the other hand, the fright was the natural effect of the storm and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm, in other words with the act of God, to afford protection to the carrier. If the disaster is the result of a combination of causes for neither of which the carrier was responsible, he cannot be made liable any more than if it had resulted from either of them alone.

For these reasons I am of opinion that the judgment of the Court below must be reversed, and judgment entered for the defendant.

GLEESON v. VIRGINIA MIDLAND RAILROAD CO.

SUPREME COURT OF THE UNITED STATES, 1891.

[140 U. S. 435.]

LAMAR, J.¹ It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three:

(1.) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a land slide, which occurred in a cut some fifteen or twenty feet deep. The defendant gave evidence tending to

¹ For the facts see *ante*, p. . Part only of the opinion is here given. — ED.

prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God"; but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In *Dorman v. Ames*, 12 Minn. 451, it was held that the man was negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. *Ewart v. Street*, 2 Bailey (S. C.), 157, 162; *Moffat v. Strong*, 10 Johns. 11; *New Brunswick Steamboat Co. v. Tiers*, 4 Zab. (24 N. J. Law) 697; *Great Western Railway v. Braid*, 1 Moore P. C. (N. S.) 101.

(2.) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary and both are intended for one result; which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land slides and consequent dangerous obstructions to the track itself, from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

LYSAGHT v. LEHIGH VALLEY RAILROAD.

UNITED STATES DISTRICT COURT, 1918.

[254 *Fed.* 351.]

DEMURRER to three pleas interposed to a complaint.

The complaint alleged: That on June 17, and June 22, 1916, the plaintiff caused to be delivered to the receiver of the Missouri, Kansas & Texas Railway two carloads of spelters to be transferred from the State of Kansas to the State of New York for export, consigned to the Iola Zinc Company, New York, and that for each carload the Missouri, Kansas & Texas Railway issued a bill of lading in standard form as approved by the Interstate Commerce Commission. That the defendant as connecting carrier received these two carloads for the completion of the transportation through the states of New York, Pennsylvania, and New Jersey, and to the city of New York. That thereafter, and on the 30th day of July, 1916, while in possession of the defendant, and at the port of New York, the carloads were destroyed by fire, to the damage of the plaintiff in the sum of \$15,544.23.

The second cause of action repeats the allegations of the first, and adds that the loss of the spelters was due to the negligence of the defendant. This cause of action is not the subject of the present controversy.

The defendant pleaded, for a first plea: That the spelters were destroyed as the natural result of certain explosives and munitions of war, in the course of transportation in interstate and foreign commerce as a necessary incident to the great European war, and that they exploded without fault of the defendant, for reasons beyond its control. That such explosion was a great public calamity, of which both the plaintiff and the defendant were innocent victims, and for which the defendant was in no wise responsible.

LEARNED HAND, District Judge. This case depends directly upon the Carmack Amendment of the Interstate Commerce Law, which the Supreme Court has many times declared completely to regulate all the liabilities of common carriers engaged in interstate commerce. The Interstate Commerce Law, § 20, as now amended (Act February 4, 1887, c. 104, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595), provides that an initial carrier shall be liable for all loss or damage "caused by it," but that the section as a whole shall not affect "any remedy or right of action" which the shipper shall have "under the existing law." The phrase "existing law" means existing common law as understood in the federal courts, and excludes changes effected by state statutes. *Adams Express Co. v. Croninger*, 226 U. S. 504, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Southern*

Express Co. v. Byers, 240 U. S. 614, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway Co. v. Prescott, 240 U. S. 639, 36 Sup. Ct. 469, 60 L. Ed. 836. A connecting or terminal carrier's liability is subject to the same rules as the initial carrier's. Georgia, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

The question, therefore, becomes whether the "federal law" as so understood excuses the defendant in such circumstances as the pleas allege. That the explosion of the substances carried by the defendant can be regarded as in any sense an "act of God," cannot be supported, as that phrase has always been understood. They were inherently unstable compounds, not combined by spontaneous processes of nature, but under human direction, and from no point of view could the release of energy attendant upon their resumption of stable chemical conditions fall within the definition of that phrase. Even though the conventional limits of an "act of God" be vague and irrational, and though there may be still some latitude for interpretation which did not seek to make the definition turn upon the degree of violence of the elements, there is a clear difference between the acts of the elements which all must endure, and the results of human contrivance like this. If it be urged that the affinity of the dissociated atoms of an unstable chemical compound be a force of nature, the fact is true; but it is quite irrelevant, for the laws of nature attend every action of man, including even the operation of his consciousness. The distinction was devised, not for chemists, but for common men, and must be read in their terms. So viewed, the elements had nothing to do with the calamity, but only the hand of man. Nor can the damage be attributed to any "vice" of the plaintiff's goods, however that word be construed. They were injured by the "vice" of other goods in the carrier's or others' custody, and not by their own.

If, then, the common expressions of carrier's liability be accepted, there is no escape here for the defendant, and so it insists that these are only loose and ill-founded formulas, which will not endure historical analysis. The answer is, I think, to be found, not there, but in the definite purposes of the statute which covers the whole subject. There cannot be any doubt, from the latest expression of the Supreme Court (Cincinnati, etc., Ry. Co. v. Rankin, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265), that section 20 was intended to adopt the carrier's liability as it was understood at that time, and that the language of Mr. Justice Lurton in *Adams Express Co. v. Croninger*, 226 U. S. 491, 506, 507, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, is not to be taken as interpreting the phrase "caused by it" as in limitation of any pre-existing liability. He was indeed discussing, not that question, but only whether the language extended the carrier's liabilities as fixed at common law, which he thought it did not, but that rather it implied "a liability for

some default in its common-law duty as a common carrier." It may, perhaps, be too much to assert that the proviso of section 20 incorporates unyieldingly the exact status of the federal common law into the statute in its whole concreteness, yet it certainly does affirm in general the liability of carriers so derived as a part of the statute itself. Any radical departure from that law would violate the fair import of the phrase, and if there is to be any such it must be by express act of Congress. So much follows from the scheme of the section, which since 1906 has been obviously molded with an eye to the generally accepted liabilities of carriers as a foundation for the very specific changes prescribed from time to time.

It is, of course, possible to conceive the common law so incorporated to be such only as the courts might after a historical scrutiny accept, leaving them free even for radical modifications in the doctrine as generally expressed when the language first appeared in section 20. But I do not so understand the substance of the matter. Whether ill or well founded historically, the exceptions to a carrier's absolute liability had come to have a classic form, and I do not agree that a nice inquiry into the foundations of the current doctrine was contemplated by the statute. The section incorporated what was generally accepted in the form in which it had become accepted, and rendered irrelevant the conclusions at which historical scholarship might arrive as to its justification. The structure of the system created by the act presupposed the existing law as then understood, and if it bears too heavily on the railroads their only relief is by an application to the Commission or to Congress. The courts have no such powers.

Therefore it seems to me quite beside the mark to engage in the examination which the defendant invites. Moreover, the implicit assumption of its case I do not accept, that justice necessarily lies on its side. I am aware of no long-accepted convention, which usage has made into an axiom of justice, and which throws a loss like this upon the shipper as against the carrier. Each party is quite innocent, and while it may be that the ordinary risks of ownership should fall upon the shipper, it is not apparent to me that the custody of the carrier may not be thought to modify those risks as between the two. The fact seems rather to be that all such *a priori* considerations are *in vacuo*, and that the relative rights of the parties may be only settled in the light of the function assigned to the carrier in the economic system of the country. That is a matter so obviously out of the province of a court and within that of Congress, where the conflicting economic interests may exert their mutual political powers, that I need hardly express any opinion upon it, even if I were in any position to do so. Whatever may be the debatable limitations of a carrier's liability still left open within the accepted general formulas, they do not raise any questions here.

Demurrer sustained.

DENNY v. NEW YORK CENTRAL RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1859.

[3 *Gray*, 481.]

MERRICK, J. This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former, and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported seasonably nor with reasonable dispatch. By their failure to exercise the degree of care and diligence required of them by law, it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city, it was submerged by a sudden and violent flood in the Hudson River. This rise of the water caused the alleged injury to the wool.

Upon the evidence adduced by the parties at the trial, three questions of fact were submitted to the determination of the jury. It is necessary now to advert only to the first of those questions; for the finding of the jury in relation to the second was in favor of the defendants, and the verdict in relation to the third has on their motion been already set aside as having been rendered against the weight of evidence in the case.

In looking at the terms and language in which the action of the jury in reference to the first of these questions is expressed, it would perhaps, at first sight, seem that they had passed upon and determined the precise point in issue between the parties, namely, whether the wool was injured by reason of an omission on the part of the defendants to exercise the care and diligence in the transportation of the wool, which the law required of them as common carriers. If this were so, it would have been a final and conclusive determination. But upon a closer scrutiny of the statements in the report, it appears that the jury, by their answer to the question submitted to them, intended only to affirm, that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure and the consequent detention of the wool at Syracuse it was injured by the rise of water in the Hudson, and thereby sustained damage to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot, and carried forward to Boston before the occurrence of the flood. And it was upon this ground that the verdict was rendered for the plaintiff. This was so considered by both parties in their arguments upon the questions of law arising upon the report.

It is therefore now to be determined by the court, whether the defendants are, by reason and in consequence of their negligence in the prompt and seasonable transportation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that, upon the well settled principles of law applicable to the subject, they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Con. 456. The rule is not limited to cases in which special damages arise; but is applicable to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev. § 256. 2 Parsons on Con. 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it. Story on Bailments. 586. Angell on Carriers, 201. Morrison v. Davis, 20 Penn. State R. 171.

In the last named case, it is said that there is nothing in the policy of the law relating to common carriers, that calls for any different rule, as to consequential damages, to be applied to them. In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms. It was an action against the defendants, as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked below Piper's Dam, by reason of an extraordinary flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods; and that, had it not been for this, the boat would have passed the point where the accident occurred, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that, inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, they were therefore liable for it. But the court, assuming that the flood was the proximate cause of the disaster, held, that the lameness of the horse, by reason of which the boat, in consequence of his inability thereby to carry it forward with the usual and ordinary speed, was exposed to the influence and dangers of the flood, was too remote to make the defendants responsible for the goods which were lost in the wreck. It was only, in connection with other incidents, a cause of the final, direct and proximate cause by which the damages sought to be recovered were immediately occasioned.

There is so great a resemblance between the circumstances upon which the determination in that case was made, and those upon which the question under consideration in this arises, that the decision in both ought to be the same. In this case, the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual, ordinary and reasonable speed. The consequence of this fail-

ure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263. *Nutting v. Connecticut River Railroad*, 1 Gray, 502. The rise of waters in the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable.

It follows from these considerations, that the verdict in the plaintiff's behalf must be set aside, and a new trial be had; in which he will recover such damages as he proves were the direct consequence of the negligence of which the defendants may be shown to have been guilty.

New trial ordered.

FOX v. BOSTON AND MAINE RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1889.

[148 Mass. 220.]

MORTON, C. J. The plaintiff offered to prove that on February 22, 1881, he made a special contract with the defendant, by the terms of which it was to transport a car-load of apples from Haverhill to Portland, and deliver it to the Maine Central Railroad, a connecting railroad, in time to be transported by the latter corporation to Bangor by a freight train which left Portland early in the morning of February 23; that the weather was mild on the 22d and 23d days of February, and that "the agreement with the defendant was made with reference to the mildness of the weather, and the importance of having the apples delivered to the Maine Central Railroad at the agreed time"; that the defendant negligently delayed to deliver the apples at the time

agreed, and by reason of this negligence they "were caught in cold weather in course of transportation from Portland to Bangor, arriving at the latter place in a frozen condition." The presiding judge ruled that, "if the market value of the apples when they reached Portland was only diminished in the respect that a liability of being frozen during the course of the transportation by the Maine Central Railroad was incurred or increased by reason of the negligent delay of the defendant in the transportation from Haverhill to Portland, the plaintiff cannot recover in this action for that diminution in market value." If we understand this ruling, its effect was to restrict the plaintiff's right to recover to the diminution in the market value of the apples at Portland caused by the delay, and to prevent his recovering anything for the damage to the apples by freezing in the transportation from Portland to Bangor.

The general rule is, that where goods are delivered in the usual way to a carrier for transportation, and there is a negligent delay in delivering them, the measure of damage is the diminution in the market value of the goods between the time when they ought to have been delivered and the time when they were in fact delivered. *Ingledeu v. Northern Railroad*, 7 Gray, 86. *Cutting v. Grand Trunk Railway*, 13 Allen, 381. *Scott v. Boston & New Orleans Steamship Co.*, 106 Mass. 468. *Harvey v. Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421. These cases are put upon the ground that the duty of the carrier is the measure of his liability; that his duty is to carry the goods to the end of his line, and that any future risks to which the goods may be exposed are not within the contemplation of the parties or the scope of their contract. But we think a different rule prevails where the parties make a special contract, which provides for certain risks to which the goods are exposed on the connecting line.

Thus, in the case before us, the parties made a special contract, by which the defendant agreed to deliver the apples to the Maine Central Railroad by a fixed time, so that they would arrive in Bangor in the afternoon of February 23. Both parties knew that the apples were not to be sold in Portland, but were to be forwarded to Bangor, and the special contract was made for the purpose of avoiding the danger of the apples freezing on the connecting line. This risk was anticipated and contemplated by the parties, and if the danger which it was intended to provide against was incurred by reason of the negligent failure of the defendant to perform its contract, it ought to be responsible in damages. The damages are not too remote. If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage; it is none the less so, because it happened on a connecting line. The damage was not caused by any extraordinary event subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected, a change of temperature.

The case is thus distinguished from the cases of *Denny v. New York Central Railroad*, 13 Gray, 481, and *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. In each of these cases, the loss to the plaintiff was caused by an extraordinary event, a fire and a freshet; and the court held that the defendants, although guilty of negligent delay, were not responsible, because the event was not one which would reasonably be anticipated. In the case at bar, the event which caused the loss was contemplated by the parties when they made their contract as a probable consequence of the breach of it.

The case before us is distinguishable from *Ingledew v. Northern Railroad*, 7 Gray, 86. In that case the opinion is based upon the ground, that it did not appear that "the defendants assumed any duty in relation to the delivery of the boxes to another carrier," or that they "were charged with any duty in forwarding the ink to Keene, or that the officers of the defendant corporation knew of its destination beyond their own line." The facts of the two cases are different, and for the reasons above stated we are of opinion that different rules of damages are to be applied in them, and that in the case at bar, upon the facts which he offered to prove, the plaintiff is entitled to recover the damage which he sustained by reason of the freezing of the apples between Portland and Bangor.

Exceptions sustained.

GREEN-WHEELER SHOE CO. v. CHICAGO, ROCK ISLAND
AND PACIFIC RAILWAY CO.

SUPREME COURT OF IOWA, 1906.

[130 Ia. 123.]

MCCLAIN, C. J. In the agreed statement on which the case was tried without other evidence being introduced it is stipulated that the defendant was guilty of negligent delay in the forwarding of the goods of plaintiff from Ft. Dodge to Kansas City, where they were lost or injured on May 30, 1903, by a flood which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby.

We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss.

On this question there is a well-recognized conflict in the authorities. In several well-considered cases decided by courts of high authority it was decided, while the question was still new, that the negligent delay of the carrier in transportation could not be regarded as the proximate

cause of an ultimate loss by a casualty which in itself constituted an act of God, as that term is used in defining the carrier's exemption from liability, although had the goods been transported with reasonable diligence they would not have been subjected to such casualty, and these cases are very similar to the one before us inasmuch as the loss in each instance was due to the goods being overtaken by an unprecedented flood for the consequence of which the carrier would not be responsible. *Morrison v. Davis*, 20 Pa. 171 (57 Am. Dec. 695); *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.), 481 (74 Am. Dec. 645); *Railroad Co. v. Reeves*, 10 Wall. 176 (19 L. Ed. 909); *Daniels v. Ballantine*, 23 Ohio St. 532 (13 Am. Rep. 264); *Hunt v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 74 S. W. 69; *Gleeson v. Virginia Midland R. Co.*, 5 Mackey (D. C.), 356. These cases are predicated upon the view that if the carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss, and should be disregarded in determining the liability for such loss. A similar course of reasoning has been applied in other cases, where the loss has been due immediately to some cause such as accidental fire involving no negligence on the part of the carrier and within a valid exception in the bill of lading, but the goods have been brought within the peril stipulated against by negligent delay in transportation. *Hoadley v. Northern Trans. Co.*, 115 Mass. 304 (15 Am. Rep. 106); *Yazoo & M. V. R. Co. v. Millsaps*, 76 Miss. 855 (25 South. 672, 71 Am. St. Rep. 543); *General Fire Extinguisher Co. v. Carolina & N. W. R. Co.*, 137 N. C. 278 (47 S. E. 208). For similar reasons it has been held that loss of or injury to the goods by reason of their inherent nature, as by freezing or the like, will not render the carrier liable, even after negligent delay in transportation, if such casualty could not have been foreseen or anticipated as the natural and probable consequence of such delay. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Herring v. Chesapeake & W. R. Co.*, 101 Va. 778 (45 S. E. 322).

On the other hand, it was held by the Court of Appeals of New York in a case arising out of the same flood which caused the destruction of the goods involved in *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.), 481 (74 Am. Dec. 645), *supra*, that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by the flood, was sufficient ground for holding the carrier to be liable for the loss. *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564 (86 Am. Dec. 415); *Read v. Spaulding*, 30 N. Y. 630 (86 Am. Dec. 426). And the same court has adhered to this view in case of a loss by fire covered by valid exception in the bill of lading. *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500. The Illinois Supreme Court has consistently followed the rule of the New York cases in holding that negligent delay subjecting the goods to loss by the Johnstown flood rendered the carrier liable (*Wald v. Pittsburg*,

C., C. & St. L. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332) and likewise that similar delay rendered the carrier liable for damage to the goods by freezing. *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324. The Alabama and Kentucky courts have held that a destruction by fire within a valid exception in the bill of lading would not excuse the carrier if by negligent delay in transportation the goods had been subjected to such casualty. *Louisville & N. R. Co. v. Gidley*, 119 Ala. 523 (24 South. 753); *Hernsheim v. Newport News & M. V. Co.*, 18 Ky. Law Rep. 227 (35 S. W. 1115). In Missouri the Supreme Court has followed or approved of what may be designated as the New York rule, under a variety of circumstances. *Davis v. Wabash, St. L. & P. R. Co.*, 89 Mo. 340 (1 S. W. 327); *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527; *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199. And the St. Louis Court of Appeals in that State has applied the same rule in case of a loss by freezing. *Armentrout v. St. Louis, K. C. & N. R. Co.*, 1 Mo. App. 158. But the Kansas City Court of Appeals in a case of loss by flood has followed the Massachusetts and Pennsylvania cases. *Moffatt Com. Co. v. Union Pac. R. Co.* (Mo. App.), 88 S. W. 117. And the St. Louis Court of Appeals seems to have recently recognized the same rule. *Grier v. St. Louis Merchants' Bridge Terminal R. Co.*, 108 Mo. App. 565 (84 S. W. 158). In West Virginia the Supreme Court has held that negligent delay renders the carrier liable for a subsequent loss by freezing. *McGraw v. Baltimore & O. R. Co.*, 18 W. Va. 361 (41 Am. Rep. 696). In Minnesota the court has recently reviewed the whole question in a case involving the loss of goods by the same flood which caused the loss for which the present suit is brought and has reached the conclusion that the previous negligent delay of the carrier which caused the goods to be subjected to the peril of the flood "concurrent and mingled with the act of God" to such an extent that the carrier was precluded from relying upon the act of God as a defence. *Bibb Broom Corn Co. v. Atchinson, T. & S. F. R. Co.*, 94 Minn. 269, 102 N. W. 709 (69 L. R. A. 509).

The irreconcilable conflict in the authorities is recognized by text-writers, and while the weight of general authority has in many cases been said to support the rule announced in the Massachusetts and Pennsylvania cases (1 Thompson, *Negligence*, section 74; Schouler, *Bailments* [Ed. 1905], section 348; Hale, *Bailments and Carriers*, 361; 6 Cyc. 382; notes 36 Am. St. Rep. 838), other authors prefer the New York rule (*Hutchinson, Carriers* [2d Ed.], section 200; Ray, *Negligence of Imposed Duties*, 177). In the absence of any express declaration of this court on the very point, and in view of the fact that in recent cases the conflict of authority is still recognized (see 5 Cur. Law, 517) it seems necessary that the reasons on which the two lines of cases are supported shall be considered in order that we may now reach a conclusion which shall be satisfactory to us.

Mere negligence will not render one person liable to another for a

loss which the latter would not have sustained had there been no such negligence, unless the negligence consists in some violation of a duty which the one person owes to the other. *Dubuque Wood & Coal Ass'n v. City and County of Dubuque*, 30 Iowa, 176; *St. Louis, I. M. & S. R. Co. v. Commercial Ins. Co.*, 139 U. S. 223 (11 Sup. Ct. 554, 35 L. Ed. 154). And, on the other hand, it is well settled that if the negligence of one person with reference to the duty owed to another concurs with an accidental cause resulting in injury to another to whom such duty is owed the negligent person must answer for the consequences as though his negligence were the sole cause of the loss. *Savannah, F. & W. R. Co. v. Commercial Guano Co.*, 103 Ga. 590 (30 S. E. 555); *Thomas v. Lancaster Mills*, 71 Fed. 481 (19 C. C. A. 88); *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. Law, 697 (64 Am. Dec. 394); *Tierney v. New York Cent. & H. R. R. Co.*, 76 N. Y. 305; *Williams v. Grant*, 1 Conn. 487 (7 Am. Dec. 235); 1 *Thompson, Negligence*, sections 68, 73.

The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act in order to render him liable for the consequences thereof resulting from a concurrence of his negligence and another cause for which he is not responsible. In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. *Hadley v. Baxendale*, 9 Exch. 341; *Sedgwick, Elements of Damage*, 17. But in an action for tort, and the present action is of that character, recovery is not limited to the consequences within the contemplation of the parties or either of them, but includes all the consequences "resulting by ordinary natural sequence, whether foreseen by the wrongdoer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued." *Sedgwick, Elements of Damage*, section 54. It is true that for the purpose of determining whether the injury suffered by the party complaining was the natural and probable result of the wrong complained of a convenient test is to consider whether in general such a result might have been foreseen as the consequence of the wrong, but it is not necessary "that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been the natural and probable consequence." *Hill v. Winsor*, 118 Mass. 251; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 38 (48 N. W. 559, 12 L. R. A. 257). And see *Railroad Co. v. Kellogg*, 94 U. S. 469 (24 L. Ed. 256); *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356; *Hoag v. Railroad Co.*, 85 Pa. 293 (27 Am. Rep. 653); *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*

(C. C.), 135 Fed. 135; Chicago, St. P., M. & O. R. Co. v. Elliott, 55 Fed. 949 (5 C. C. A. 347, 20 L. R. A. 582); Miller v. St. Louis, I. M. & S. R. Co., 90 Mo. 389 (2 S. W. 439); Smith v. Railroad, L. R. 6 C. P. 21; 1 Thompson, Negligence, section 59.

Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. A pertinent illustration is furnished by the well-settled rule with reference to deviation which is that if the carrier transports the goods over some other route than that specified in the contract or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation, although it is from a cause which would not in itself render him liable. In such a case it is said "that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." Davis v. Garrett, 6 Bing. 716. And see Merchants' D. Transp. Co. v. Kahn, 76 Ill. 520; Crosby v. Fitch, 12 Conn. 410 (31 Am. Dec. 745); U. S. Exp. Co. v. Kountze, 8 Wall. 342 (19 L. Ed. 457, 6 Cyc. 383). It is true that the analogy to the case of a deviation is denied by the courts which announce the rule of the Pennsylvania and Massachusetts cases but the distinction attempted to be made that a deviation amounts to a conversion rendering the carrier absolutely liable is too technical to be considered as persuasive. The analogy between the two classes of

cases has been recognized in *Constable v. National Steamship Co.*, 154 U. S. 51 (14 Sup. Ct. 1062, 38 L. Ed. 903), and in *Hutchinson. Carriers* (2d Ed.), section 200.

This court has expressed itself in favor of the liability of the carrier in classes of cases very analogous to that of deviation. Where goods were shipped with the agreement that they should be carried to their destination without change of cars, and in violation of this contract the goods were unloaded at Chicago which was not their destination, for the purpose of transporting them in other cars, and they were destroyed by the Chicago fire, it was held that the carriers were liable although the loss by fire was within a valid exemption from liability contained in the bill of lading. *Robinson v. Merchants' Dispatch Trans. Co.*, 45 Iowa, 470; *Stewart v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 229. Certainly the act of the carrier in unloading the goods at Chicago, instead of carrying them through to their destination in the cars in which they were originally loaded, would not amount even to a technical conversion, nor could it have been anticipated that the result of such an act would be the destruction of the goods; nevertheless this court reached the conclusion that such a departure from the terms of the contract rendered the carrier liable for a loss for which it would not have been liable had it resulted without such departure. We think that in principle these cases support the general proposition that the wrongful act of the carrier which in fact subjects the goods to loss renders him liable for such loss although the circumstances under which it occurred could not have been anticipated. This is plainly right, for the detention due to the transfer of the goods to the other cars did increase the hazard of fire; but it is equally true in the case before us that the negligent delay increased the hazard of the loss by flood. As supporting the same view we may also refer to *Hewett v. Chicago, B. & Q. R. Co.*, 63 Iowa, 611, in which it was held that negligent delay in forwarding goods which were liable to damage by freezing rendered the carrier accountable for the loss thus resulting. In that case it is said that while the carrier is responsible for such damages only as are the proximate consequence of his own acts and is not accountable for such loss as is occasioned by the intervention of the *vis major*, yet "one of the undertakings of the common carrier is that he will not expose the property entrusted to his care to any improper hazards or extraordinary perils, and if, by his act or omission, it is exposed to perils or hazards which ordinary foresight could have apprehended and provided against, he is accountable for such injury as may be occasioned by such exposure." See, also, *Whicher v. Steam Boat Ewing*, 21 Iowa, 240.

We are satisfied that the sounder reasons, supported by good authority, require us to hold that in this case the carrier is liable for the loss of and damage to plaintiff's goods, and the judgment of the trial court is therefore *reversed*.

PENNSYLVANIA RAILROAD CO. v. FRIES.

SUPREME COURT OF PENNSYLVANIA, 1878.

[87 Pa. 234.]

PAXSON, J. The assignments of error in this case are so framed that their affirmance would have withdrawn the case from the jury. They were intended to have that effect. They all bear upon the question whether the company were guilty of such negligence as to make them responsible for the loss of plaintiff's property. The defendants in their seventh point (sixth assignment), asked the court to instruct the jury that upon the whole evidence in the case the defendants were entitled to a verdict. The court declined the instruction prayed for and allowed the jury to pass upon the question of negligence. The jury having found the negligence, the defendants would be concluded if there was sufficient evidence to submit to them. This is the question we are now called upon to determine.

The facts of the case are exceptional in their character. On the 19th of May, 1875, the plaintiff below shipped three car-loads of goods from Altoona to Houtzdale. The cars arrived at Osceola, a point on the Tyrone and Clearfield Railroad, at half past eleven o'clock on the morning of May 20th. As the train over the branch road to Houtzdale did not leave until the afternoon, the cars were run on the siding, where it was usual to place the freight for Houtzdale, preparatory to being drawn by another locomotive over the Moshannon Branch Railroad to that point. For several days previous to this a fire had been burning in the woods in the vicinity of Osceola, but it had been so far subdued that no especial anxiety was felt by the citizens of the town for its safety. Between 12 o'clock noon, and 1 p. m. of that day a high wind sprang up which increased rapidly to a tornado, and drove the fire towards the town. It soon reached the outskirts and spread with such rapidity that all efforts to check it were fruitless. In about two hours the town was practically destroyed, some three hundred houses having been consumed by the flames. The property of the citizens was nearly all burned; very few saved anything, and many had to fly for their lives. The railroad company lost nearly all their property, including the depot and a large number of cars. The three cars of the plaintiff were burned upon the siding where they had been placed. An effort was made by the employees of the company to get these cars out, but it was not successful. The heat and smoke prevented the men from coupling them. The attempt to do so was accompanied with no inconsiderable amount of danger, as the density of the smoke made it difficult to see the locomotive backing in and out.

It is very clear that the company were not responsible for the fire. The high wind by which it was carried into the town was the act of God. The cars were placed on the siding where it was customary to place cars destined for Houtzdale. That the switch was contiguous

to large piles of lumber was not material. The cars were placed on the switch in the usual and proper course of business. The company had no reason to apprehend loss from that cause. The only point seriously pressed was that the company were guilty of negligence in not getting the cars off after the fire commenced. Upon this point there was at most but a scintilla of proof. Negligence is the absence of care according to the circumstances. The circumstances here, as has already been said, were unusual. The company were not bound to have an extraordinary force on hand, for they had no reason to anticipate such a disaster. It is too much to expect every man to act with coolness and judgment in the midst of such an appalling scene. It is clear, however, that the employees of the company did all that could be reasonably expected of them to save life and property. A portion of their time was employed in aiding women and children to escape. A large number were taken in the cars to a place of safety. Had they turned their entire attention to plaintiff's property, neglected all other duties, and left helpless women and children to their fate, it is just possible they might have succeeded in getting the three cars off the siding. They were not obliged, however, to sacrifice every feeling of humanity to the preservation of plaintiff's property; and had they done so the evidence does not show that it would have been successful. Had the company preserved its own property at the expense of plaintiff's, there would have been more reason to charge them with negligence.

The release which the plaintiffs below gave the company relieved the latter from all liability except for negligence. Of this there was not sufficient evidence to have submitted to the jury, and they should have had a binding instruction to find for the defendants.¹

Judgment reversed.

NASHVILLE AND CHATTANOOGA RAILROAD CO. v. ESTIS.

SUPREME COURT OF TENNESSEE, 1872.

[7 *Heisk.* 622.]

NICHOLSON, C. J. On the fifth of February, 1862, L. W. Estis & Co. delivered to the Nashville and Chattanooga Railroad Co., at their depot in Nashville, fifty-two barrels of whisky for shipment to Memphis, and took the receipt therefor of the freight agent of the company. Prior to this date, to wit, on the 20th of January, 1862, Gen. Johnston, commander of the Confederate army, had ordered that the railroad should be used exclusively in transporting military supplies, and that no private freight should be transported. Military guards were stationed at the depot to enforce this order. On account of this military occupation of the road, the fifty-two barrels of whisky remained in the depot until the 16th of February, 1862, when they were destroyed by

¹ But see *Miller v. Steam Nav. Co.*, 10 N. Y. 431.—Ed.

order of Gen. Floyd, commanding the rear division of the retreating army, to prevent the demoralization of citizens and soldiers from drinking, and to prevent a mob. Gen. Floyd superintended the execution of this order in person.

In view of these facts, the Circuit Judge, Carey, in addition to matters not excepted to, charged the jury that the so-called Confederate government was a recognized belligerent power claiming, having, and exercising, at the time of the alleged destruction of the property in question, dominion and control over the territory occupied by the parties to this suit, and of which they were citizens. That the army of the said Confederate government was the enemy of the public or people with which the said Confederate government was at war, but was not, in the eye of the law, the enemy of the public or people of the so-called Confederate States, and that therefore, as related to the defendant to this suit, the said army was not the public enemy, and that assuming the fact to be as claimed by the defendant, that said whisky was destroyed by officers and members of said army, or by their direction and order, such fact would not constitute a defence to the plaintiff's cause of action.

Under this charge the plaintiffs obtained a verdict and judgment for \$4,000, and the defendants appealed in error to this Court.

The only question is as to the correctness of this charge.

The defendants were sued as common carriers, and one of the defences relied on was, that the whisky was destroyed by the "public enemy," and for that reason that they were not liable. The charge above quoted had special reference to that defence, and if it had been clearly confined to that, it would have been unexceptionable. The term "public enemy," as applicable to the undertaking of a common carrier, must be construed to mean the enemy of the State or Government of which the common carrier is a citizen or member. It was so held in the case of the Southern Express Co. *v.* Womack, 1 Heisk. 270. It follows as to the Confederate army that the Railroad Company could not escape the liability of a common carrier upon the ground that that army was a public enemy, and to that extent the charge was not erroneous.

But the charge does not stop with this statement of the law. It proceeds: "Assuming the fact to be, as claimed by the defendant, that said whisky was destroyed by officers of the Confederate army, or by their orders, such fact would not constitute a defence to plaintiffs' cause of action."

This portion of the charge is susceptible of two constructions. First, it may mean that the destruction of the whisky by Confederate officers would be no defence, because the Confederate army was not a "public enemy," and in that view the instruction would be entirely consistent with the law as already stated by the Judge. But second, the language used may be interpreted to mean that the destruction of the whisky by the Confederate officers could in no way be relied on as a defence to

plaintiffs' action. If the jury understood the charge in this latter sense, (and it is not unreasonable that they should have done so) they understood the instruction to be, that if the whisky was destroyed by Confederate officers to prevent it from falling into the hands of the Federal army, from which the Confederate army was retreating, or to prevent the demoralization of the troops of both armies by its use, and the consequent damages to the citizens from mobs of drunken soldiers, still such destruction of the whisky for such purposes would constitute no defence to the action under the general issue.

It is to be observed, as was correctly stated by the Circuit Judge, that at the time the whisky was destroyed, the Confederate military authorities had and exercised control and dominion over the territory where the whisky was deposited.

This control and dominion had been exercised in taking possession of the railroad, and appropriating it by military force to military purposes. For the time being, the railroad company ceased to be a common carrier and was allowed to carry only for the army. The destruction of the whisky was effected in the exercise of the same military control and dominion; and whether it was exercised as a military measure, to prevent the whisky from falling into the pursuing army, or whether upon the necessity for its destruction to save the citizens from the impending dangers of a pursuing soldiery when excited and infuriated by the use of the whisky, it is not material to inquire. Whether it was destroyed for the one purpose or the other, was a question of fact to be determined by the jury; and if the destruction was for either purpose, and under the necessity which justifies such appropriation of private property, it would be a ground of defence.

We deem it unnecessary to discuss the law applicable to this last view of the case, as it was fully laid down at the present term in the case of *Wisdom v. Harrison*.

It is sufficient for our present purpose to state that the charge of the Circuit Judge was well calculated to exclude from the consideration of the jury a ground of defence which the defendants might legitimately make, and for this error we reverse the judgment, and remand the case for another trial.

BLACKSTOCK *v.* NEW YORK AND ERIE RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1859.

[20 N. Y. 48.]

APPEAL from the Superior Court of the city of New York. The action was brought against the defendant as a common carrier, for a delay in the carriage of a large quantity of potatoes in barrels and sacks, from Hornellsville in Steuben county, to the city of New York. They were received by the defendant on different days in June, 1854, and would have been delivered, according to the usual course of busi-

ness, within five days, but they were detained about seventeen days, and when delivered were found to have become unmerchantable, and were nearly worthless on account of the delay in their transportation.

The delay was occasioned by the refusal of a large number of the defendant's engineers (140 out of a total number of 168) to work, under the following circumstances: On the 15th of May, 1854, the defendant adopted a new rule for the government of its engineers, to the effect that they were respectively to be accountable for running the train off the track at a switch, at any station where the train should stop. This rule was a substitute for a former one upon the same general subject, which had been found impracticable, and which had not therefore been enforced. The referee before whom the case was tried, found, in substance, that the new rule was a reasonable and proper one, which ought to have been submitted to by the engineers. They did perform their duties under it for a time, but when it was ascertained that it would be steadily enforced, a combination, which is called in the case "a strike," was entered into, and they gave notice that they should stop work unless the regulation should be rescinded in two days. That not being done, they refused to perform any further services, and persisted for fourteen days; at the expiration of which period they returned to their duties, and have since served under the new rule. The defendant used diligent efforts to procure other engineers to run its trains, but was not successful. The delay in transporting the potatoes was owing to the circumstances mentioned. The potatoes were owned by, and the cause of action (if any) accrued in favor of, one Rosbotham, who had assigned it to the plaintiff. The referee found that the conduct of the defendant's engineers did not furnish a defence, and reported in favor of the plaintiff for \$800 damages, for which judgment was entered and affirmed at a general term. The case was submitted on printed briefs.

DENIO, J. The position that the defendants are not responsible, because the misconduct of their servants was wilful and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged non-performance of a duty which the defendants owed to the owner of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences without regard to the motives of those persons. In the common case of a contract for services, as for building a house, which the builder had been unable to perform because his workmen had abandoned his service, proof that their conduct was wilful and every way unjustifiable would not give the party injured an action against them, nor would it excuse the party who had made the contract. A similar point was taken in *Weed v. The Panama Railroad Company* (17 N. Y. 362), where the misconduct of the defendants' servants in detaining a train of cars was active, but it was held not to furnish any answer to the action for the detention. The cases in which

it has been held that if a servant, while generally engaged in his master's business, wilfully commit a trespass, as by intentionally driving his master's carriage against the carriage of another person, the master is not liable, have no application to the present case.

It has been repeatedly held, and may be taken as settled law, that a carrier is not under the same absolute obligation to carry the goods intrusted to him in the usual time, which he is to deliver them ultimately at their destination. (*Conger v. The Hudson River R. R. Co.*, 6 Duer, 375; *Wilert v. The N. Y. & Erie R. R. Co.*, 2 Kern. 245.) But in the absence of a legal excuse, he is answerable for any delay to forward them in the time which is ordinarily required for transportation, by the kind of conveyance which he uses. In the case referred to from Kernan's Reports, we held that where a railroad was fully equipped with engines and freight carriages, but more property was offered at a particular point than could be sent forward at once, the delay was justifiable, provided no unfair preference was given to other freight over that of the plaintiff. In the present case, the excuse arises wholly out of the misconduct of the defendants' servants who wrongfully refused to perform their duty, and thus deprived the defendants, for the time, of the ability to send forward the property; and the question is whether the defendants' case can be separated from that of the engineers, so that it can be held that though the latter were culpable, their employers, the defendants, were without fault, and consequently not responsible to the plaintiff. This involves a consideration of the legal effect of the relations which exist between these several parties. In the first place, there was no privity between the plaintiff and the engineers. The latter owed no duty to the former which the law can recognize. If they had committed a positive tort or trespass upon the property, the owner might pass by the employers and hold them responsible, but for a nonfeasance or simple neglect of duty, they were only answerable to their employers. The maxim in such cases is *respondeat superior*. (*Story on Agency*, § 309; *Denny v. The Manhattan Co.*, 2 Denio, 115; *S. C. in error*, 5 id. 639.) Although the nature of the contract between the railroad company and the engineers is not disclosed in the finding, it is quite improbable that it was such that the latter might throw up their employment upon two days' notice without any legal cause. If it were of that character, the liability, moral as well as legal, would rest upon the defendants, for in that case they would have neglected a most ordinary precaution for securing the continuous running of their trains. Assuming then that abandoning their work was a breach of contract on the part of the engineers, they by that act became responsible to the defendants for all its direct consequences. The case therefore is one in which the actual delinquents, through whose fault the injury was sustained, were responsible to the defendants but were not responsible to the plaintiff. This shows the equity of the rule, which holds the master or employer answerable in such cases. Its policy is not less apparent. Those who

intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions. In the case of a loss by the misconduct of a servant, the party injured has no means of ascertaining whether due caution was exercised by the master in employing him, or prudence in retaining him; and in the case of a controversy between the master and the servant as to which was the real delinquent, the owner of the property must generally be without the necessary evidence to charge the liability upon the master. The rule which the law has adopted, by which the master is held responsible for the acts of his servants, is the one best calculated to secure the observance of good faith on the part of persons intrusted with the property of others. The motive of self-interest is the only one adequate to secure the highest degree of caution and vigilance by the master. The principle itself is extremely well settled. (Story on Agency, § 452; 2 Kent Com. 259; Harlow v. Humiston, 6 Cow. 189; Ellis v. Turner, 8 Term R. 531.)

I cannot see anything in the circumstances of the defendants to take the case out of the rule. Being a corporation, all their business must necessarily be conducted by agents, and if they are not liable for their acts and omissions, parties dealing with them have no remedy at all. A railroad corporation is no doubt peculiarly exposed to loss from the misconduct of its engineers; and in the present case it does not appear that the slightest blame can attach to any of the superior officers of the company. Still the property intrusted to the defendants to carry has been lost from a failure on their part to perform the duty with which they were charged, and the only answer which they are able to make to the demand for compensation, is that the failure was caused by the misconduct of their servants. This we have seen cannot avail them as a defence. I have looked into the exceptions to the rulings of the judge upon the trial, and think those rulings were in both the instances where exceptions were taken entirely correct.

The judgment of the Supreme Court must be affirmed.

SELDEN, J., was absent; all the other judges concurring,

Judgment affirmed.

PITTSBURGH, FORT WAYNE AND CHICAGO RAILROAD
CO. v. HAZEN.

SUPREME COURT OF ILLINOIS, 1876.

[84 Ill. 36.]

DICKEY, J. On the 10th of December, 1870, Hazen shipped, by the freight line of the railway company, a quantity of cheese from Chicago to New York. The cheese was delivered to the consignees, at New York, on the 28th of December — eighteen days after the shipment. The proofs tended to show that the usual period of such transit, at that

time, did not exceed twelve days; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 28th, and that the cheese, when delivered in New York, was frozen, and thereby damaged to the amount of \$1100.55, and for this amount was the verdict and judgment in favor of Hazen, from which the railway company appeals.

As an excuse for this delay beyond the usual period of such transit, the defendant, at the trial below, sought to prove that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Leavitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who, up to that time, had been employed by the railway company; that the brakemen refused to work, and were discharged, and other brakemen promptly employed, but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court.

This, we think, was error. It is, doubtless, the law, that railway companies can not claim immunity from damages for injuries resulting in such cases from the misconduct of their employees, whether such misconduct be wilful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier cannot promptly supply their places with other employees, and injury results from the delay, the carrier is responsible; — such delay results from the fault of the employees. The evidence offered in this case, however, tends to prove that the delay was not the result of a want of suitable employees to conduct the trains, for the places of the "strikers" were, according to the proof offered, promptly supplied by others. The proof offered, tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen, and others acting in combination with them. These men, at the time of this lawlessness, were no longer the employees of the company. The case supposed is not distinguishable in principle from the assault of a mob of strangers.

All the testimony on this subject should have been submitted to the jury, for their determination of the question whether, under all the circumstances, the period of transit was unnecessarily long.

For the delay resulting from the refusal of the employees of the company to do duty, the company is undoubtedly responsible. For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company.

Where employees suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employees in refusing to do their duty, and this misconduct in such case is justly considered the proximate cause of the delay; but when the places of

the recusant employees are promptly supplied by other competent men, and the "strikers" then prevent the new employees from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employees, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.

The judgment is, therefore, reversed, and the cause remanded for a new trial.

Judgment reversed.

GEISMER v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO.

COURT OF APPEALS, NEW YORK, 1886.

[102 N. Y. 563.]

ACTION to recover damages for alleged negligence on the part of defendant in the performance of a contract for the transportation of live stock. The cattle were shipped from Toledo to Buffalo. When they reached Collingwood, Ohio, the defendant was willing and desirous to continue the carrying of the stock to Buffalo, and had all the necessary cars, locomotives and employees to make up and manage the train, but it was prevented from immediately proceeding in consequence of a portion of its employees striking and refusing to run the train or to permit others so to do. The strike was because of a reduction of ten per cent in the wages of the employees. The strikers took forcible possession of some of the engines and placed them in the round house. They were in number over two hundred, the greater portion of whom had been employees of the defendant. The defendant exerted themselves with great diligence to move the trains and induce the strikers to permit the defendant to use its property. There was a sufficient number of other competent workmen willing and ready to take the places of the strikers to have moved the train except for the violent opposition of the strikers. The strike continued for eleven days.¹

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided. (*Wibert v. N. Y. & Erie Railroad Co.*, 12 N. Y. 245; *Blackstock v. N. Y. & Erie Railroad Co.*, 20 id. 48.)

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what,

¹ This statement has been condensed from that of the reporter. — Ed.

under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employees for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they wilfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employees who were willing to serve it. They became a mob of vicious law-breakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that they were not in its service or seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The mischief did not come from the strike — from the refusal of the employees to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. (*Pittsburg & C. R. R. Co. v. Hogen*, 84 Ill. 36; *Pittsburgh, C. W. L. R. Co. v. Hallowell*, 65 Ind. 188; *Bennett*

v. L. S. & M. S. R. R. Co., 6 Am. & Eng. R. Cas. 391; *I. & W. L. R. R. Co. v. Juntzen*, 10 Bardwell, 295.)

The cases of *Weed v. Panama R. R. Co.* (17 N. Y. 362), and *Blackstock v. N. Y. & Erie R. R. Co.* (1 Bosw. 77; affirmed, 20 N. Y. 48), do not sustain the plaintiff's contention here. If in this case the employees of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are, therefore, of opinion that this judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

LANG v. PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA, 1893.

[154 Pa. 342.]

WILLIAMS, J. The defendant is sued as a common carrier for its failure to deliver a quantity of whiskey shipped over its line of road. The defence set up is that the whiskey was lost in the Johnstown flood. The train was overtaken by the flood but it was not swept away. After the avalanche of water caused by the breaking of the South Fork dam had passed, the train was left upon the track, and the cars were uninjured. The track above and below it was injured so that the train could not resume its journey at once, but remained in the same place until the necessary repairs were made. The whiskey claimed for in this action was not destroyed by a flood. Part of it was stolen by thieves after the flood subsided, and the rest of it was destroyed by a volunteer guard of citizens who had watched and protected the train during the night following the flood and part of the next day, as the easiest way of keeping it from falling into the hands of the same dangerous class of men who had gotten a taste of it on the previous afternoon. The flood was therefore not the cause of the loss, but the occasion, the opportunity for its plunder by bad men. The thieves came in the wake of the flood to pick up and appropriate what the more merciful waters had spared. They came to this train and began to force open the doors of some of the cars. The conductor and part, if not all, of his crew came upon the ground at about the same time. They saw an axe being used to open one or more of the cars but they made no effort to defend the train or drive away the thieves. They did not so much as remonstrate with them, or order them away; but turning their backs they surrendered the train and its freight to the tender mercies of the vagabonds who had attacked it, and went away from the neighborhood. Private citizens came soon

after, drove the thieves out of, and away from, the train and stood guard over it all night and until the middle of the next day; but the train men seem to have had neither part nor lot in the effort to save the property of their employer. The reason was given by one of them while on the witness stand with a cool, deliberate heartlessness not often met with in the most hardened criminals. He said he did not try to help the citizens save the cars and their contents because he "had no orders to do so." He stood and looked on. He saw the peril of his employer's property. He saw citizens, with no personal interest involved trying to save it, but he did not help because he "had no orders." Whether he and others like him were cowards shivering with fear in the presence of a few thieves whom unarmed citizens drove away, or were thieves at heart and in full sympathy with those who were trying to loot the cars that they should have defended, is a matter of no consequence. In either case they neglected their obvious duty. The railroad company was represented in the carriage and safe-keeping of the freight on the train by the men to whom the train had been committed. If they deserted their posts and left the goods uncared for, and they were stolen or destroyed, their employer must suffer for their inefficiency. Under the facts of this case the loss sued for did not arise from inevitable accident, or the act of God. It did not result from insurrection or the public enemy. It was not the work of a mob. It was due in part to plain stealing, done in daylight, in the presence of the train men and without the slightest resistance or remonstrance on their part. For the rest, it was due to the action of citizens who, after having guarded what remained for nearly twenty-four hours, destroyed it, when they could no longer keep up their watch over it, rather than see it consumed by the human brutes to whom it had been abandoned by the train men.

The court below disposed of this same case properly and the judgment is affirmed.

THE IDAHO.

SUPREME COURT OF THE UNITED STATES, 1877.

[93 U. S. 575.]

STRONG, J. In determining the merits of the defence set up in this case, it is necessary to inquire whether the law permits a common carrier to show, as an excuse for non-delivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has been much debate in courts of law, and some contrariety of decision.

In Rolle's Abr. 606, tit. "Detinue," it is said, "If the bailee of goods deliver them to him who has the right to them, he is, notwithstanding, chargeable to the bailor, who in truth has no right; and for

this, 9 Henry VI. 58, is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner (id. 607), for which 7 Henry VI. 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced, can hardly command assent now. It is now everywhere held, that, when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery, according to the directions of the bailor. *Bliven v. Hudson River Railroad Co.*, 36 N. Y. 403. And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect. *King v. Richards*, 6 Whart. 418; *Bates v. Stanton*, 1 Duer, 79; *Hardman v. Wilcock*, 9 Bing. 382; *Biddle v. Bond*, 6 Best & S. 225. If it be said, that, by accepting the bailment, the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer, that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed, — to restore it, or to account for it. *Cheeseman v. Exall*, 6 Exch. 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. *Biddle v. Bond*, *supra*. Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true, that, in some of the cases, fraud of the shipper has appeared; and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess; and, if he cannot withhold the possession from the true owner, one claiming under him cannot. The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge, that, if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. In the late case of *Biddle v. Bond*, *supra*, decided in 1865, it was so decided; and

Blackburn, J., in delivering the opinion of the court, said there was nothing to alter the law on the subject in the circumstance that there was no evidence to show the plaintiff, though a wrong-doer, did not honestly believe that he had the right. Said he, the position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person whose title is set up, or fraudulently acting in derogation of them. In *Western Transportation Company v. Barber*, 56 N. Y. 544, the Court of Appeals of New York unanimously asserted the same doctrine, saying, "The best-decided cases hold that the right of a third person to which the bailee has yielded may be interposed in all cases as a defence to an action brought by a bailor subsequently for the property. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." The court repudiated any distinction between a case where the bailor was honestly mistaken in believing he had the right, and one where a bailor obtained the possession feloniously or by force or fraud; and we think no such distinction can be made.

We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him, without any pretence of ownership. But if he has performed his legal duty by delivering the property to its true proprietor, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees.¹

It follows from all we have said that the delivery by the "Idaho" of the one hundred and sixty-five bales, to the order of Porter & Co., was justifiable, and that the libellants have sustained no legal injury.

Decree affirmed.

THOMAS v. NORTHERN PACIFIC EXPRESS CO.

SUPREME COURT OF MICHIGAN, 1898.

[73 *Minn.* 185.]

MITCHELL, J. This action was brought to recover damages for the failure of the defendant to deliver to the consignees several small consignments or shipments of fish which plaintiff had delivered to the defendant, as a common carrier, for transportation and delivery to the consignees.

¹ The learned judge then discussed the question of title and held that Porter & Co., to whose order the steamer had delivered the cotton in question, owned the cotton. — *Ed.*

The substance of the defence was that the fish had been caught in the State of Minnesota with nets, contrary to law, and consequently still belonged to the State; and that they were taken from the possession of the defendant by the State through its agent, the game warden. In short, the defendant justified its nondelivery to the consignees by a delivery on demand to the rightful owner.

The trial court found "That part of each of the shipments aforesaid were fish illegally caught with a gill net, but from the evidence it is impossible to determine what amount was illegally caught, and what was the value and quantity of the fish legally caught."

As a conclusion of law from these facts, the court held that the plaintiff was entitled to recover of the defendant the value of all the shipments, for the reason "That it does not appear . . . that . . . notice of such seizure was immediately given either to plaintiff or the consignees."

The learned judge evidently confounded two entirely distinct defences which a common carrier may interpose as a justification for nondelivery of property to the consignee, to wit: First, that he delivered the property on demand to some one else who was the rightful owner and entitled to the possession of it; and, second, that the property was taken from his possession on legal process against his bailor, and that he immediately notified his bailor of the fact. The first is always a sufficient defence of a bailee against the claim of the bailor, and there is no difference in this regard between a common carrier and any other bailee. The Idaho, 93 U. S. 575; Hutchinson, Car. § 404. To constitute the second defence, the bailee must promptly notify his bailor of the seizure, so as to give him the opportunity to defend his title. The law does not require a common carrier to defend a title of which he presumably knows nothing, but in case of seizure on legal process it does require him to notify his bailor, so that the latter may defend. Where the carrier delivers the property, on demand, to one claiming to be a rightful owner, he of course assumes the burden of proving, as against the claim of his bailor, that such person was the rightful owner; but we know of no rule of law requiring him to give notice to his bailor of such delivery. All of the authorities cited by plaintiff's counsel are cases where the property had been taken from the carrier by legal process.

But in this case the game warden, as agent of the State, claimed and took it as its property. Wild game belongs to the State in its sovereign capacity. No person can acquire any property in it, except by catching or killing it at the time and in the manner authorized by law. If a person catches or kills it at a time or in a manner prohibited by statute, it still remains the property of the State, which may reclaim it, *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098.

The court does not find by whom or with what intent the fish legally caught were commingled with those illegally caught. In view of the evidence, they must have been intermingled either by the plaintiff or

by the fishermen who caught them, and from whom plaintiff bought them. Neither does the court find that they were incapable of being distinguished, but merely that it was impossible to determine from the evidence what amount was legally and what amount was illegally caught.

We do not find it necessary to go into a general discussion of the law relating to the confusion of goods, nor do we think that a case where goods, a part of which confessedly belonged to each of two different persons, are intermingled, is entirely analogous. We have here a case where all of the property originally belonged to the State, and no one could acquire any right to or in it except by catching it at a time and in a manner authorized by statute. At least a part of it still belongs to the State, because caught in an illegal manner. If any person claims that another part, commingled with it, was caught in a legal manner, and thereby became his property, we think the burden is on him to show what part belongs to him, and not on the State to prove what part belongs to it. Where game or fish illegally killed or caught is commingled with that which was legally killed or caught, any other rule would in many cases render it very difficult to enforce the provisions of the game laws. *Order reversed, and a new trial granted.*

VALENTINE v. LONG ISLAND RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1907.

[187 N. Y. 121.]

HAIGHT, J.¹ This action was brought to recover the value of about one hundred and twenty tons of iron rails, fish-plates, bolts, spikes, etc., of which the plaintiff claimed to be the owner and which he alleged had been converted by the defendant. The evidence tended to show that in the latter part of the year 1899 the plaintiff applied to the station agent of the defendant at Woodsburg, near Cedarhurst, for cars and rate for shipping rails from that station to New York. The agent was unable to give the desired information, but subsequently obtained the rate and cars from a superior officer, and a few days thereafter the plaintiff loaded the cars and they were started for their place of destination. It is undisputed that the rails were never transported to New York or delivered to the plaintiff or his consignee, but the evidence is to the effect that the defendant subsequently ascertained that the rails belonged to it, and, therefore, they were sidetracked at Jamaica and the delivery to the plaintiff was refused. . . .

We are thus brought to the consideration of the question upon which the Appellate Division has reversed the judgment. The defendant, as we have seen, is a common carrier sued for conversion of the rails

¹ Part of the opinion is omitted. — Ed.

which had been shipped over its line. It pleaded title to the goods, and a verdict was directed in its favor. The Appellate Division has reversed upon the ground, as stated in its opinion, that this plea was not available as a defence; but here again our examination of the record fails to disclose any motion, request or exception that raised this question upon the trial. The defendant was permitted not only to plead title without question, but to prove it upon the trial without having the attention of the court called to the question as to whether such a defence was available to the defendant. But assuming that the question was raised and that the Appellate Division had the right to consider it, we doubt the correctness of the conclusion reached with reference thereto. The rule undoubtedly is that a bailee cannot plead *jus tertii* against his bailor and that such rule applies to common carriers. (The Idaho, 93 U. S. 575.) The reason for the rule is that by such a plea the bailee or the common carrier might through the claim of some third person keep the property for himself. But there are a number of exceptions to this rule, as for instance where the property has been taken from the bailee by process of law, or where the title of the bailor had terminated, or where the bailor was an agent and the return of the property to him had been forbidden by his principal, or where it appears that the plaintiff had obtained possession of the property feloniously or tortiously by felony, force or fraud and the property has been surrendered to the owner or the officers of the law, or where the true owner has demanded the same and the bailee has surrendered the property to him. (Mullins v. Chickering, 110 N. Y. 513, 514; Shelbury v. Scotsford, Yelv. 23; Hardman v. Willcock, 9 Bing. 382, 384; King v. Richards, 6 Wharton [Pa.], 418; Bursley v. Hamilton, 15 Pickering, 40; Wright v. Pratt, 31 Wis. 99; Edmunds v. Hill, 133 Mass. 445; Angell on Carriers, § 336; Story on Bailments, §§ 120, 266, 582, and authorities cited.) But the rule of *jus tertii* pertains to a right of property in third persons and not this case. The reason that reference has been made to the rule applicable thereto is on account of the claim that the same rule should apply as between the bailor and bailee. In this case the plaintiff delivered the rails to the defendant for transportation to a place designated. The defendant received the goods and undertook to transport them for the plaintiff. Ordinarily it would be liable for breach of contract in case it failed to deliver the goods in accordance with the contract and would be estopped from interposing the plea of ownership, for it could not be permitted by failing to assert ownership at the time of shipment to obtain possession of the property and then assert title. But this rule has its exceptions and the exceptions are similar to those already discussed under the rule of *jus tertii*. If the defendant received the property for transportation in good faith without knowledge that it was its property and thereafter discovered that the property belonged to it, we see no reason why in an action for conversion it may not avail itself of the defence that the property belonged to it, with the same

force and effect that it could have availed itself of the right of a true owner in case of a third person. It had the right to show that it was deceived by the plaintiff's claim of ownership when the property was tendered for transportation, and that by reason thereof it was excused from investigating the facts and asserting its ownership. The defendant, however, is not permitted by this defence to shift the burden of proof. The plaintiff proves his cause of action by showing that he delivered the property to the defendant for transportation. The burden then was cast upon the defendant of showing that it received the goods in good faith under a mistake of fact as to the plaintiff's ownership, and that it was the true and paramount owner of the property.

The order of the Appellate Division should be reversed and the judgment of the trial court affirmed, with costs in all courts.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Ordered accordingly.

STILES v. DAVIS.

SUPREME COURT OF THE UNITED STATES, 1861.

[1 *Black*, 101.]

NELSON, J. The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857: and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury, that any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnisheed, as the property of third persons,

of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of *Drake on Attach't*, 2d edition.

This precise question was determined in *Verrall v. Robinson*, (*Turwhitt's Exch. R.* 1069; 4 *Dowling*, 242, *S. C.*). There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord Abinger, C. B., observed, that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no evidence of a wrongful conversion to his own use. After it was attached as Banks's property, it was not in the custody of the defendant, in such a manner as to permit him to deliver it up at all. And Alderson, B., observed: Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no justification, if the plaintiff could have maintained a title and right to possession in themselves.

*Judgment of the court below reversed, and venire de novo, &c.*¹

¹ See *Pingree v. Detroit L. & N. R. R.*, 66 *Mich.* 143. — *ED.*

EDWARDS *v.* WHITE LINE TRANSIT CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1870.

[104 *Mass.* 159.]

WELLS, J. The only exception relied on here is that which relates to the car-load of "middlings" taken from the carriers by attachment, and sold on execution, in a suit brought in New York against the plaintiffs' consignors, David Schwartz & Company, by parties from whom they had previously obtained the property.

The court held, and we think correctly, that there was a sufficient transfer and delivery from David Schwartz & Company, to vest the title in the plaintiffs; that the suit against David Schwartz & Company, the judgment therein, and levy upon the property, were sufficient to show a waiver of the condition of the sale by which David Schwartz & Company obtained possession of it from the former owners. Aside from that consideration, any defect in the title of the bailor could not be set up against him or against his consignee, by the bailee, unless the superior title had been asserted against the bailee. In this case the property was not taken from the carrier by virtue, or upon the assertion of any superior title in the former owners. It was taken as the property of David Schwartz & Company, by means of legal process against them. For all purposes of this decision, therefore, we may lay out of view the claim that Schwartz & Company had not acquired title and right to transfer the property, and regard the plaintiffs as having become the absolute owners of it before the attachment.

The judge who tried the case decided, that, "as under the attachments the goods were taken out of the possession of the defendants" without collusion, negligence or fraud on their part, "the performance of their contract to carry and deliver the goods was thus rendered impossible by the intervention of a superior power, which necessarily excused them from such performance; that, upon the attachment by the sheriff of the goods, the same came into the custody of the law; whether they were the property of the plaintiffs or of David Schwartz & Company, they were in the custody of the law for adjudication;" and that the defendants could not be held liable for not transporting and delivering goods so taken from them. This ruling is in accordance with what might seem, at first sight, to be the decision of the Supreme Court of the United States in *Stiles v. Davis*, 1 Black, 101. The defendants' counsel insist that to hold otherwise would be in direct conflict with that decision.

We do not so regard the matter. In *Stiles v. Davis*, the action was not brought upon the contract of carriage; nor for a violation, by the defendant, of his obligations as carrier. It was an action of trover for the conversion of the goods. The failure to deliver the goods at another place than that of their destination, upon a demand made there; with

no denial of the plaintiffs' right, but merely for the reason that they were detained under attachment by legal process; would not be a conversion of the property. The case decides nothing more. The question, whether the same facts would constitute a good defence to a suit against the defendant for breach of his contract or obligation as common carrier, was not decided, and was not raised by the form of the action. The opinion, by Mr. Justice Nelson, does indeed assign, as a reason for the decision, that the goods "were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it;" that "the right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs." But this language must be interpreted with reference to the precise question then under consideration. In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use. But that custody was of no effect against any one having an interest in the property, not made party to the suit in which the process issued. It was not in the custody of the law in the sense in which property that is the subject of proceedings *in rem* is in the custody of the law, or property actually belonging to the party against whom the suit is brought. In personal actions, the attachment of property of another than a defendant in the suit is a trespass; and, as to the true owner, the property is not regarded as in the custody of the law. It may be reclaimed by replevin; except where the replevin would bring state and federal authorities into conflict, as in *Howe v. Freeman*, 14 Gray, 566; S. C. 24 How. 450. The officer may always be held liable as a trespasser for its full value, notwithstanding the pendency, and without reference to the suit in which the attachment was made. This liability is expressly recognized in the closing paragraph of the opinion of Mr. Justice Nelson. See also *Buck v. Colbath*, 3 Wallace, 334. It does not appear, from the report, how far, if at all, the decision in *Stiles v. Davis* was affected by the fact that the carrier was made a party to the proceedings, as garnishee.

The present suit is brought against the defendants upon their contract as carriers. Assuming that the title to the property had vested in the plaintiffs, according to the finding of the facts at the trial, the attachment by the officer, in a suit against David Schwartz & Company, was a mere trespass. As against the plaintiffs, it was of no more validity than a trespass by any other unauthorized proceeding, or by an unofficial person. The carrier is not relieved from the fulfilment of his contract, or his liability as carrier, by the intervention of such an act of dispossession, any more than he is by destruction from fire, or loss by theft, robbery or unavoidable accident. In neither case is he liable in trover for conversion of the property; but he is liable on his contract, or upon his obligations as common carrier. The owner may,

it is true, maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him.

It will not be understood, of course, that these considerations apply to the case of such an attachment in a suit against the owner of the property. If the present plaintiffs had been defendants in the suit in which the attachment was made, the case would have stood differently. In that state of facts, the property would have been strictly in the custody of the law, so far as these parties were concerned, and the intervention of those legal proceedings would have deprived the plaintiffs of the right to require the delivery of the property to themselves until released from that custody.

But it is not so upon the state of facts shown by this report; and the ruling of the court against the plaintiffs upon this branch of the case was wrong. They are therefore entitled to a new trial upon the counts of their declaration relating to the car-load of "middlings"; and for that purpose the

*Exceptions are sustained.*¹

OHIO AND MISSISSIPPI RAILWAY CO. v. YOHE.

SUPREME COURT OF INDIANA, 1875.

[51 Ind. 181.]

DOWNEY, J.² This was an action by appellees against the appellant as a common carrier. The action was commenced in Knox county, and the venue changed to Martin.

It is alleged in the complaint that the plaintiffs' consignors, on the 3d of November, 1873, delivered to the appellant, at Bridgeport, Illinois, a quantity of wheat, to be carried to Vincennes, Indiana, and delivered to the appellees. The appellant signed and delivered a bill of lading evidencing the contract, and this is the foundation of the action.

It is alleged that the company failed to deliver the wheat according to the contract, etc. A demurrer to the complaint was filed and overruled.

The defendant moved the court, on affidavit, to stay the action until the determination of an action of replevin in Illinois, involving the title and ownership of the property, brought by one Johnson. This motion having been overruled, the defendant asked that Johnson be made a party to the action, which request was also refused. Thereupon the defendant pleaded, in substance, that while the wheat was in a car of

¹ See *Bliven v. Hudson River R. R.*, 36 N. Y. 403; *Bennett v. American Exp. Co.*, 83 Me. 236. — ED.

² Part of opinion is omitted. — ED.

the company, at Bridgeport, awaiting the coming of a train and engine to transport it to Vincennes, in accordance with the bill of lading, without any act, fault or connivance of the defendant, or of any of her agents, servants or employees, Johnson sued out of the office of the clerk of the circuit court of Lawrence county, Illinois, a writ of replevin, the said Johnson then and there claiming to be the owner and entitled to the possession of said wheat, and, by virtue of said writ, the sheriff of said county seized and took the same out of the possession of the defendant, and delivered the same to said Johnson, according to law and the command of said writ, and the said Johnson took possession thereof; that said action is yet pending, by reason whereof the defendant was prevented from transporting said wheat to said city of Vincennes and delivering the same to the plaintiffs. It is averred that said Lawrence Circuit Court had jurisdiction, and certified copies of the papers and process in the action of the replevin, etc., are filed with the answer.

A demurrer to this answer, on the ground that it did not state facts sufficient to constitute a defence to the action, was filed by the plaintiffs and sustained by the court. The defendant declining to answer further, there was judgment for the plaintiffs.

It is objected to the complaint that it does not show that the plaintiffs own the wheat, or that they are the consignees mentioned in the bill of lading. There is no foundation for these objections. The complaint alleges that the plaintiffs purchased the wheat of the consignors; that the consignors delivered the same to the defendant; and that the defendant executed the bill of lading to the plaintiffs.

It is further assigned as error, that the court improperly sustained the demurrer to the answer.

The question presented is this, is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault or connivance on his part seized, by virtue of legal process, and taken out of his possession?

It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process.

After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of law.

The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their

remedy against the officer who seized them, or against the party at whose instance it was done. As between these parties, the process would be no justification, if the plaintiffs were the owners and entitled to the possession of the goods.

It makes no difference, we think, that the process was issued by a tribunal of a state different from that in which the plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the state of the plaintiff's residence.

It cannot be denied that the carrier must obey the laws of the several states in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It cannot say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another state, and therefore he cannot have it. The sheriff would have the right, and it would become his duty, to call out the power of the county to aid in serving his lawful process.

The carrier is deprived of the possession of the property by a superior power, the power of the state — the *vis major* of the civil law — and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the “act of God or the public enemy.” In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either. . . .

There is a defect, however, in the answer, which justified the circuit court in holding it bad, and that is the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of its possession. That the carrier should do this, seems to be a necessary and reasonable qualification of the rule. The rule is laid down with this qualification in *Bliven v. The Hudson River R. R. Co.*, 36 N. Y. 403. The only averment as to notice in the answer is this: “And the defendant further avers that said plaintiffs had notice before the commencement of this suit, that said action of replevin was pending,” etc. The bill of lading bears date November 3d, 1873. The writ of replevin bears date November 5th, 1873. The wheat was taken and delivered to Johnson on the 6th day of November, 1873. The record does not show when this action was commenced. The first date given is that of the filing of the amended complaint, February 7th, 1874. There is nothing from which we can find that proper diligence was used by the carrier in giving notice of the seizure of the goods.

It may be repeated that the wheat was received by the defendant on the 3d day of November, 1873, and was not seized until the 6th. It is probable that a satisfactory excuse or reason should be alleged why the wheat was not moved before the seizure. The answer admits the receipt of the wheat and the execution of the bill of lading, on the 3d of November, and then alleges, “and thereupon said wheat was loaded into a car of defendant then standing upon her side track, at said town

of Bridgeport, and while said wheat was in said car, and so upon said track, and awaiting the arrival of a train and engine to transport the same to the city of Vincennes aforesaid, in accordance with the terms of said bill of lading, and without the act, fault or connivance of the defendants or of any of her agents, servants or employees, one Benjamin F. Johnson sued out." etc. It is very questionable whether this shows proper diligence on the part of the carrier. We need not, however, decide this question. Clearly, we think, the carrier cannot make use of the fact that the property has been seized by legal process to shield himself from liability for his own negligence, or to justify any improper confederation with the party or officer seizing the goods.

The rulings of the court on the motions to stay the proceedings in the action, and to cause Johnson to be made a party to the action, were proper, for the reasons stated in determining the validity of the answer.

A question is made concerning the publication of a deposition taken by the plaintiffs, which, it is contended, was not properly directed on the envelope. But as the deposition was not used on the trial, the defendant could not have been injured by this ruling.

The judgment below is affirmed, with costs.

THE M. M. CHASE.

DISTRICT COURT OF THE UNITED STATES, 1889.

[37 Fed. 708.]

In Admiralty. Libel for non-delivery of cargo attached under legal process.

In August, 1888, P. M. Kane, at Eastport, Me., shipped upon the above-named schooners three lots of sardines, consigned to the libellants in this city, for sale on commission; one lot on board the Trigg on August 9th, and two lots on board the Chase on August 13th and 16th. Bills of lading were delivered to the shipper on the same dates, making the goods deliverable to the libellants at this port. Kane, on the same days, respectively, drew upon the libellants against the goods consigned, notified them thereof by letter, inclosing the bills of lading, and on the same day got the drafts cashed at the Frontier National Bank, at Eastport. The drafts were each payable at five days' sight to the order of the cashier of that bank. They were presented in due course, and, upon the faith of the bills of lading previously received by the libellants, were accepted as follows: August 14th, draft for \$450; August 16th, draft for \$400; August 20th, draft for \$200. The first draft was against the Trigg's bill of lading; the last two against those of the Chase. All were paid at maturity.

On August 20th, all the sardines in question were seized and removed from both schooners by the sheriff of the county, at Eastport;

under a writ of attachment issued out of the Supreme Court of Maine, in a suit by Blanchard and others against Kane, the shipper, in an action of debt for the sum of \$1,100, upon which judgment was afterwards entered at the October term, and the goods sold. The sheriff received the attachment on Friday, the 17th, and his return states a levy about 3 p. m. of that day. On Saturday keepers were put in charge. The master protested against the attachment, stated the issue of bills of lading, and much talk ensued with the captains, managing owner, and attaching creditor. On Saturday afternoon, however, it was understood that the attaching creditor would give to the sheriff a bond of indemnity for the removal of the goods, which was done on Monday, the 20th. The first notice to the libellants was a telegram sent them by the managing owner between 11 and 12 o'clock on Monday, stating that Kane's shipments were attached that morning, and that the sheriff was removing the goods. The telegram was received by the libellants late in the afternoon, after the draft of \$200 had been accepted. The next morning they replied by telegram that they "held the bills of lading and had made full advances on the goods," adding, "Can you attend to the matter and secure us? Answer." The next day, the 22d, the managing owner replied: "Will do what I can for you. You must send power to make demand for the sardines." Nothing further was done by either party until the arrival of the schooners in this port, when they were libelled in these suits for damages for the non-delivery of the goods according to the contract of the bills of lading.

The statutes of Maine provide (chapter 81, §§ 43-45), that "property mortgaged, pledged, or subject to any lien created by law, and of which the debtor has the right of redemption, may be attached, held, and sold as if unencumbered, * * * if the attaching creditor first tenders or pays to the mortgagee, pledgee, or holder the full amount unpaid of the demand so secured thereon;" that when property attached is claimed by virtue of such pledge or lien the claimant "shall not sue the attaching officer until he has given him at least 48 hours written notice of his claim, and the true amount thereof," and "the officer or creditor may within that time discharge the claim by paying or tendering the amount due thereon, or he may restore the property;" that the officer may give the claimant "written notice of the attachment, and, if he does not within ten days thereafter deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon." By section 40, when property attached is claimed by a person not a party, he may replevy it within 10 days after notice given him therefor by the attaching creditor, and not afterwards; and thereafter the attaching officer, without impairing the rights of such person, at the request and on the responsibility of the plaintiff, may sell the property.

Kane had been dealing with the libellants in the same way for some time previous, and was largely indebted to them on general account.

BROWN, J. (*after stating the facts as above*). In the case of *Stiles v. Davis*, 1 Black, 101, the Supreme Court decided that the carrier was not liable in trover for non-delivery to the true owner of goods attached and taken from the carrier's possession by the sheriff under process against a third party. The decision did not turn upon the form of the action. The grounds stated in the opinion are that the goods when seized under judicial process are in the custody of the law, and that the plaintiff had mistaken his remedy as to the persons liable. "They should have brought their action," it is said "against the officer who seized the goods, or against the plaintiff in the attachment suit, if he directed the seizure." Mr. Justice CLIFFORD in *Wells v. Steam-Ship Co.*, 4 Cliff. 232, says that such "clearly" was the decision. This is not at all incompatible with the subsequent qualifications added by the decisions of the tribunals of several of the states, and now generally laid down in text-books, namely, that the seizure must not be brought about by any laches or connivance of the carrier, and that he give prompt notice of the attachment. These qualifications seem also to have the approval of Mr. Justice CLIFFORD in the case cited.

The whole subject has been exhaustively reviewed by HAMMOND, J., in the case of *Robinson v. Railroad Co.*, 16 Fed. Rep. 57, 9 Fed. Rep. 129, where the carrier was held liable for laches after notice of the intent to attach. See *Hutch. Carr.*, §§ 367-375; *Schonler, Bailm.*, §§ 428, 498; *Mierson v. Hope*, 2 Sweeny, 561; *Railway Co. v. Yohe*, 51 Ind. 181; *Bliven v. Hudson, etc., Co.*, 36 N. Y. 403. I feel bound to hold, therefore, that seizure by judicial process under the conditions above stated, has been added as one of the implied exceptions in the carrier's contract, limiting, *pro tanto*, the general rule of the common law that the carrier is liable for non-delivery under the bill of lading through any causes not accepted therein.

The further question remains, whether the master, from the time he had notice of the attachment, performed the duties imposed upon him by the maritime law, in the protection of the libellants' interests. The duty of protection is to a certain degree recognized as incumbent upon carriers by land. *Hutch. Carr.*, § 202. The duty of giving notice is one form of this obligation. The general duty of protecting the owner's interests is, however, more specially applicable to carriers by sea, from the more frequent necessity of it in maritime commerce; and it has accordingly long been a prominent feature of the maritime law. The powers and the duties of ship-masters arising out of the exigencies of navigation, and the circumstances and relations growing out of foreign commerce are much broader than those of carriers by land within the kingdom. The master of a vessel, in all exigencies, has authority to do whatever is necessary to preserve the interests of a foreign owner or consignee. He is bound to the exercise of diligence and good faith; to give the owner or consignee timely and needful information; and to take his instructions, when practicable. In case of

capture or seizure it is his duty to interpose a proper claim, and to defend the rights of the owners of the ship and cargo. 3 Kent, Comm. *213; *Cheviot v. Brooks*, 1 Johns. 364; *Lemon v. Walker*, 9 Mass. 404; *Hannay v. Eve*, 3 Cranch, 247. In *Willard v. Dorr*, 3 Mason, 166, STORRY, J., says, in reference to a seizure at Calcutta: "He has not only a right, but it is his imperative duty, to remain by the ship until a condemnation, or all hope of recovery is gone. He is intrusted with the authority and obligation to interpose a claim for the property before the proper tribunal, and to endeavor by all the means in his power to make a just and successful defence. To abandon the ship to her fate without asserting any claim would be a criminal neglect of duty, and would subject him to heavy damages for a wanton sacrifice of the property. * * * His duties do not, indeed, cease even with condemnation, but he is to act for the benefit of all concerned; and, if he should deem an appeal to be expedient, he is bound to enter it."

In the case of *The Mary Ann Guest*, Olcott, 501, where the libellant, as in this case, had made advances on the bill of lading, but was not the consignee named therein, the schooner was held liable by BETTS, J., because, as he says, the bill of lading "guaranties to protect the right of possession to the shipper and his assigns," and because the master "did not interpose, as he might have done, in the replevin suit against the shipper;" and on appeal the decision was affirmed by Mr. Justice NELSON (1 Blatchf. 358). Upon the decision in *Stiles v. Davis*, *supra*, I do not feel at liberty to follow *The Mary Ann Guest*, so far as to hold the bill of lading an absolute guaranty that the master will protect the consignee's right of possession. But upon the well-settled rules of maritime law it is the undoubted duty of the master, "upon any interference with his possession, whether by legal proceedings or otherwise, to interpose for the owner's protection, and to make immediate assertion of his rights and interests, by whatsoever measures are appropriate at the time and place." To that extent the master is bound to take part in legal proceedings, and to continue them until, after informing his absent consignee both of the facts and the local law so far as need be, the owner has a reasonable opportunity to take upon himself the burden of the litigation. The question arises under the law of the sea, not of the land. Upon maritime questions, the states are treated as foreign to each other, and the same general obligation is applicable as if the ship were in a foreign country. The general rule is the same, whether the ship and the consignee are nearer or more distant. Its application varies. Where communication may be had daily or hourly, the duty of speedy notice is the more imperative, and the ship has the corresponding advantage of being able to terminate her obligations to the cargo-owner the more quickly.

I must hold the respondents answerable in this case both for laches, and because they did nothing beyond mere protest, without using the preliminary means that, under the law of the state, were specially provided to secure the libellants' interests.

1. Timely notice of the attachment proceeding itself was not given. Notice was delayed until the third day afterwards. Had a telegram been sent on Friday, or even on Saturday afternoon, instead of Monday forenoon, the acceptance of the draft of \$200 would have been prevented.

2. No such notice of the libellants' claim and lien as the statutes of Maine provide for was given to the sheriff by the master or managing owner, as should have been given. The sheriff's proceeding was cautious. Kane, being general owner, the attachment was rightly levied, provided the libellants, as consignees, had made no advances on the goods, and consequently had no lien thereon. But the consignees, by their advances, had a "lien created by law," within the very letter of the statute. The attaching creditor was doubtless acquainted with the general mode of dealing between Kane and the libellants; and he might therefore reasonably expect that, if there was any lien upon the goods for advances, it would be made known in the manner provided for in the state law, and could be verified; and that, if found correct, the lien could be paid off, at less than the value of the goods: or, if it amounted to their full value, that the attachment might then be relinquished. To hold the goods after a lien on them was made known, without offering to pay it, would be a plain trespass under the law of that state. *Stief v. Hart*, 1 N. Y. 28; *Campbell v. Conner*, 70 N. Y. 424, 428. The evidence does not show any intention to commit a trespass, or to assume a position that could not be maintained. Had the facts been made known to the sheriff, or to the attaching creditor, they could have been verified by either probably within a few hours; and presumptively the levy on two of the lots at least would have been released, as the debtor had no valuable attachable interest in them. *Mutual v. Sturgis*, 9 Bosw. 665. All that was needed to secure the libellants' rights was apparently to give written notice of their lien, as provided by law. There is no reason to suppose that the facts in regard to the consignees' interests could not have been learned by the master within a few hours after the attachment, upon inquiry of the shipper at Eastport. The letters of August 20th and 22d from the managing owner show conclusively that he was well informed of the shipper's affairs, and knew that the libellants were selling on commission, and that Kane had got advances on these goods. But without regard to that, had the master or the managing owner communicated with the libellants as soon as notice of the attachment was given by the sheriff, instead of waiting until Monday, they would plainly have received sufficient information to serve the notice provided by law, and probably in time to prevent even any removal of the goods on which the drafts had been already accepted.

3. After receipt of the libellants' telegram of the 22d, neither the master nor the managing owner took any steps to secure the libellants, as was promised in the answering telegram. They were informed that the libellants had advanced upon bills of lading to the value of the

goods. If they did not know the value it was easy to ascertain it by inquiry, so far as was necessary to give written notice of the lien. They knew, or are presumed to have known, the requirements of the law of their own state. There is no such presumption as respects the libellants. The respondents' reply, to "send power to make demand for the sardines," was frivolous and impertinent. No demand was necessary, or, if needed for any purpose, the master had full authority already. After proper notice of a lien, the master, as representative of the cargo interests, had every power that was needed to enforce the rights of the absent consignee. Such a request, with nothing done by the master or managing owner after this promise by telegram; with the further fact, testified to by the sheriff, that the master or managing owner refused to make any demand for their freight, to which in any event they were legally entitled (*Tindal v. Taylor*, 4 El. & Bl. 219), — shows a deliberate intent not to follow the course marked out by the statute, which was designed for the protection of both. Whether the consignees' remedy against the sheriff was thereby lost, the evidence is not sufficient to show. But this is immaterial. The respondents must be held liable to the consignees, because they wholly failed to perform their duty; and they must look for indemnity to the sheriff or attaching creditor, if they have not lost that right by their own laches. The libellants are not bound to prove that the goods would certainly have been saved. The burden is on the respondents to prove that pursuing the course required by law could not possibly have made any difference. *The Pennsylvania*, 19 Wall. 125, 136; *The Frank P. Lee*, 30 Fed. Rep. 277, 280; *The Dentz*, 29 Fed. Rep. 526, 528.

This is not shown either as to the draft of \$200, or as respects the payment of the lien, or the return of the goods.

If the value of the goods was more than the advances, the libellants probably had an additional lien to their full value from the time of their receipt of the bills of lading and the acceptance of the drafts thereon, because of the balance due them as factors on general account. As no excess of value, however, is proved, a decree is directed for the libellants in the case of the Trigg for \$450 only, with interest and costs, and in the case of the Chase for \$600, with interest and costs.

SMITH v. NEW HAVEN AND NORTHAMPTON
RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1886.

[12 All. 531.]

FOSTER, J. In this action against a railroad company for injuries received by cattle while being transported to market, it appeared that, when the train arrived at Westfield, the barriers of a car door were found to be broken down and three of the cattle were missing.

The defendants requested the presiding judge to rule that if the corporation used due care, and the injury was occasioned by the unruliness of the cattle, the plaintiff could not recover. This instruction was properly refused.

The common law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property. *Wilson v. Hamilton*, 4 Ohio (N. S.), 722. *Palmer v. Grand Junction Railway*, 4 M. & W. 749. *White v. Winnisimmet Co.*, 7 Cush. 155.

To this general rule there is an apparent exception, supported by authority and which we adopt, that the liability of the carrier does not extend to injuries caused by the peculiar character and propensities of the animals to themselves or each other. Perhaps this qualification is in principle only an application to live freight of the familiar rule which relieves the carrier from responsibility where fruit perishes by natural decay, or the inherent defects of merchandise destroy its value. Although the carrier insures the arrival of the property at the point of destination against everything but "the act of God and of public enemies," yet the condition in which it shall arrive there must depend on the nature of the article to be transported. He does not absolutely warrant live freight against the consequences of its own vitality. *Hall v. Renfro*, 3 Met. (Ky.) 51. *Clarke v. Rochester & Syracuse Railroad*, 4 Kernan, 570.

Vicious and unruly animals may injure or destroy themselves or each other; or frightened animals may die of terror or starve themselves by refusing food, notwithstanding every precaution it is possible to use. For such occurrences the carrier is not answerable. He will be relieved from responsibility for casualties of this description, if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires. In arrangements and precautions to guard against injuries occasioned by the faults and vices of animals to themselves or each other, the carrier is bound to use an amount of diligence analogous to that required of passenger carriers in the transportation of human beings. But the sufficiency of a car door to resist the struggles of animals, however unruly, it is in the power of a railroad company to secure. And its obligation in this respect is not satisfied by furnishing a reasonably strong car. The company is bound to have one absolutely and actually sufficient. It is practicable to make a car so thoroughly strong that cattle cannot break it down and fall out. For any failure to do so the carrier is responsible.

We should have no difficulty in sustaining the verdict for the plaintiff, were it not broadly and unqualifiedly stated in the instructions given that the defendant corporation was liable as a common carrier for injuries occasioned by the viciousness and unruly conduct of the

cattle. So far as the sufficiency of the car was concerned, we assent to this statement. In its application to unavoidable injuries done by the cattle to themselves or each other, we regard it as incorrect.

There are two other qualifications of the liability of common carriers which may be referred to, not because of any fact appearing in the present case, but for completeness of statement and to avoid misapprehension. Where the owner of animals or goods retains the custody of them during their transit, the carrier is not as absolutely liable as he otherwise would be. *White v. Winnisummet Co.* above cited. Also, where the owner of animals or other property is aware of any circumstances which render peculiar care and attention necessary to safe transportation, and which the carrier does not or is not presumed to know, he must give notice of such peculiarities in order that suitable precautions may be employed. *Wilson v. Hamilton*, above cited.

Perhaps the facts at the trial furnished no room for the distinction, in consequence of the omission of which we are constrained to set aside the present verdict. But of this we cannot be sure, and on that narrow ground only the exceptions are sustained.

The rule of damages was accurately stated. If, as we understand from the exceptions, the defendants received the cattle knowing that they were designed to reach New York in season for a particular market day, the loss sustained by wrongful delay in transportation is the difference in market value between the time when they ought to have arrived and when they actually did arrive at the *terminus* of the road. Whether without such knowledge, in a case of unreasonable detention or delay, the rule would not be the same, we need not now decide.

Exception sustained.

LISTER v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

KING'S BENCH DIVISION, 1903.

[1903, 1 K. B. 878.]

THE plaintiff employed the defendants as common carriers to carry an engine from his yard to a neighboring town on their line. The engine was on wheels with shafts to draw it, and had been purchased by the plaintiff second-hand a few months before. The defendants sent two men, two boys, and two horses for the purpose, and the men and boys were competent and the horses proper for the purpose. The horses were harnessed to the engine, which was drawn out of the yard, and whilst they were proceeding along the road one of the shafts broke, the horses took fright, became unmanageable and upset the engine, which was damaged in consequence. The shaft was rotten at the point where it broke, but this was not known either to the plaintiff or the defendants, and could not have been discovered by any ordinary examination. The county court judge was of opinion that the rule,

that a common carrier is excused from liability for damage if it be caused by the inherent vice of the thing carried, is limited to cases in which the inherent vice itself directly causes the damage without any contributory act done by the carrier, as in the case of a vicious animal injuring itself, or overripe fruit becoming damaged by the pressure of its own weight; and he accordingly held that, as the shaft would not have broken but for the strain put upon it by the defendants' own act, its defective condition afforded no excuse.

The defendants appealed.

LORD ALVERSTONE, C. J. I am of opinion that the county court judge has put a limitation upon the rule which is not justified by any authority. It must be taken that the engine was being conveyed in the ordinary way in which a common carrier would have conveyed it, and therefore no point can be made as to there being a possible alternative and safer mode of carriage. It may be that if there is no evidence of intention by the parties as to how the thing is to be carried, and there are alternative modes of carriage, one of which will give play to an inherent defect in the thing carried and the other of which will not, the carrier will be responsible if he adopts the former mode and damage result therefrom, unless indeed the adoption of the safer mode would involve the taking of precautions which it would be altogether unreasonable to require him to take. But that is not the case here. It is obvious that all parties intended that the engine should be taken to the station on its own wheels. The county court judge, in thinking that the rule as to the non-liability of a common carrier for damage caused by an inherent defect in the thing carried was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went much too far. When once you arrive at the fact that the thing is being carried in the ordinary way, and every precaution has been taken consistent with that mode of carriage, and the accident happens from the unfitness of the thing for that mode of carriage, the carrier is not responsible.

WILLS, J. I am of the same opinion.

CHANNELL, J. I agree. I think the proposition may be stated thus: The inherent unfitness for the carriage contemplated, although not known to either party, is inherent vice within the meaning of the exception that has been established by the decided cases.

Appeal allowed.

TITCHBURNE v. WHITE.

GUILDHALL, 1718.

[1 *Strange*, 145.]

Per KING, C. J. If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is

money in it.¹ But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases I hold the carrier is not liable.

GIBBON v. PAYNTON.

KING'S BENCH, 1769.

[4 Burr. 2298.]

THIS was an action against the Birmingham stage-coachman, for £100 in money sent from Birmingham to London by his coach, and lost. It was hid in hay, in an old nail-bag. The bag and the hay arrived safe: but the money was gone. The coachman had inserted an advertisement in a Birmingham news-paper with a *nota bene*, "that the coachman would not be answerable for money or jewels or other valuable goods, unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried." He had also distributed hand-bills, of the same import. It was notorious in that country, that the price of carrying money from Birmingham to London was three pence in the pound. The plaintiff was a dealer at Birmingham; and had frequently sent goods thence. It was proved that he had been used, for a year and a half, to read the news-paper in which this advertisement was published; though it could not be proved that he had ever actually read or seen the individual paper wherein it was inserted. A letter of the plaintiff's was also produced, from whence it manifestly appeared that he knew the course of this trade, and that money was not carried from that place to London at the common and ordinary price of the carriage of other goods: and it likewise appeared from this letter, that he was conscious that he could not recover, by reason of this concealment. The jury found a verdict for the defendant.

Lord MANSFIELD, C. J.,² distinguished between the case of a common carrier, and that of a bailee. The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own: but a common carrier, in respect of the premium he is to receive, runs the risque of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery.

This action is brought against the defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive: and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security: and therefore he ought, in reason and justice, to have a greater reward. Consequently, if the owner of the

¹ *Acc.* Merchants' D. T. Co. v. Bolles, 80 Ill. 473. See *The Denmark*, 27 Fed. 141. — Ed.

² Concurring opinions are omitted. — Ed.

goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here the owner was guilty of a fraud upon him: the proof of it is over abundant. The plaintiff is a dealer at Birmingham. The price of the carriage of money from thence is notorious in that place: it is the rule of every carrier there. It is fairly presumed that a man conversant in a trade knows the terms of it. Therefore the jury were in the right, in presuming that this man knew it. The advertisement and hand-bills were circumstances proper to be left to the jury. The plaintiff's having been used, for a year and an half, to read this news-paper is a strong circumstance for the jury to ground a presumption that he knew of the advertisement. Then his own letter strongly infers his consciousness of his own fraud, and that he meant to cheat the carrier of his hire. Therefore I entirely agree with the jury in their verdict. And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*

As to the cases cited — that of Kenrig v. Eggleston, in Aleyn 93, was £100 in a box delivered to a carrier; the plaintiff telling him only “that there was a book and tobacco in the box:” and Rolle directed that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for, he need not tell the carrier all the particulars in the box: but it must come on the carrier's part to make special acceptance. But in respect of the intended cheat to the carrier, he told the jury they might consider him in damages: notwithstanding which, the jury gave £97 against the carrier for the money only, (the other things being of no considerable value,) abating £3 only for carriage. *Quod durum videbatur circumstantibus.* Now, I own that I should have thought this a fraud: and I should have agreed in opinion with the *circumstantibus*; which seems to have been also the opinion of the reporter.

So in the case cited by Hale, in 1 Ventris 238, of a box brought to a carrier, with a great sum of money in it; and upon the carrier's demanding of the owner “what was in it,” he answered “that it was filled with silks and such like goods of mean value;” upon which, the carrier took it, and was robbed: and resolved “that he was liable.” But (says the case) if the carrier had told the owner “that it was a dangerous time; and if there were money in it, he durst not take charge of it:” and the owner had answered as before; this matter would have excused the carrier. In this case also, I own that I should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money: for, it was artfully concealed from him, that there was any money in the box.

The case of Sir Joseph Tyly and others against Morrice, in Carthew 485, was determined upon the true principles — “that the carrier was liable only for what he was fairly told of.” Two bags were delivered to him, sealed up, said to contain £200 and a receipt taken accordingly, with a promise “to deliver them to T. Davis; he to pay 10s. per cent for carriage and risque.” The carrier was robbed. The Chief

Justice was of opinion that he should answer for no more than £200 "because there was a particular undertaking by the carrier for the carriage of £200 only; and his reward was to extend no further than that sum; and 't is the reward that makes the carrier answerable: and since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward." So the jury were (in that case) directed to find for the defendant.¹

EDWARDS v. SHERRATT.

KING'S BENCH, 1801.

[1 *East*, 604.]

LORD KENYON, C. J.² . . . The plaintiffs had certain agents at Wolverhampton, with whom this corn was deposited in order to be sent to Birmingham. There was a great disposition to riot manifested in the neighborhood on account of the prevailing scarcity; and the mob had pulled down a corn mill not far distant, and it was understood that they had threatened to come to the warehouse where this corn was deposited. The agents alarmed, wrote a letter to the defendant, desiring him to send an extra boat for it as quickly and as privately as he could. No answer was returned to this; but with the impression that the corn was unsafe where it then was, and that it would fall into the hands of the mob, the plaintiffs' agents, finding one of the defendant's boats going by, without any intention of staying at Wolverhampton, or seeking to take in goods there, stop the boat, and prevail on the boatman to take in this corn; and it is afterwards sent away by night in an unusual manner, a person being sent privately to give directions for opening the lock at whatever time the boatman chose to pass. To me there is fraud apparent on the face of the transaction; and that is the main ground on which my opinion proceeds. All the circumstances and urgency of the case should have been disclosed to the boatman at the time, and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this. For no man in his senses would under these circumstances have taken the corn under a liability as a common carrier. And if the cause had been tried before a jury of merchants at Guildhall, they would not have hesitated a moment to say, that the whole was a rank fraud against the defendant; and I should have felt myself bound to tell them that such was my opinion. I think therefore that the learned judge who tried the cause did right: he leaned to the opinion that this was not a transac-

¹ *Acc. Kuter v. Michigan Cent. R. R.*, 1 Biss. 35; *Hayes v. Wells*, 23 Cal. 185; *Chicago & A. R. R. v. Shea*, 66 Ill. 471. — ED.

² Part of this opinion only is given. The other judges delivered concurring opinions. — ED.

tion in the common course of trade; but he left it to the jury to draw their own conclusion from the evidence: and I am satisfied with their verdict. As to the evidence offered on the money count, it came too late after the plaintiffs had closed their case: and under such circumstances they ought not to be let into the proof.

PHILLIPS *v.* EARLE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1829.

[8 *Pick.* 182.]

THIS was an action against the defendants, who were owners of the New York mail coach, as common carriers, to recover the value of a package of laces, which had been sent by the plaintiff to one of the defendants' coaches to be transported to Hartford.¹

PARKER, C. J. The box which was lost was delivered to the agent of the defendants, and they therefore became liable as common carriers for the safe transportation and delivery of it, unless the objections stated by their counsel, or some of them, are valid.

First, it is said that the defendants ought to have been informed of the value, in order that they might have been aware of the necessity of extraordinary care. But, by the authorities, this was not necessary, there being no notice given by the defendants of any limitation of their liability. They might have asked the quality and value of the contents of the box, and if they had, any false answer would have been fraudulent and have excused them. Or if there had been any concealment or deception, the same consequence would have followed. The very form and appearance of the box, and its peculiar lightness, and the manner in which it was secured, were strong indications that the contents were valuable. The defendants therefore, if they wished to increase the compensation on account of the value, ought to have been upon their guard and made the proper inquiries.

NEW JERSEY RAILROAD AND TRANSPORTATION CO. *v.*
PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF NEW JERSEY, 1858.

[3 *Dutch.* 100.]

POTTS, J.² This cause was tried at Essex Circuit, and a verdict rendered for the plaintiffs for \$2534.60 damages.

The action was brought against the New Jersey Railroad and Transportation Company, for damages sustained by the plaintiffs in the destruction of a car which, in process of transportation over the defendants' road, had been thrown from the track. . . .

¹ The evidence and arguments of counsel and part of the opinion are omitted.—ED.

² Part of the opinion is omitted.—ED.

In the second place, it is argued that the court below erred in instructing the jury, "that though the plaintiffs or their agent made misrepresentations to the defendants of the character and measurement of the car to be transported, yet that if such misrepresentations related to matters which might have been ascertained by the defendants by measurement and examination, that such misrepresentations cannot be held to be a deception."

It appeared in evidence that Wasson had stated to the employees of the New Jersey road that the gauge of this car was one and a half inches narrower than the road, whereas in fact it was two inches narrower; and also, that Cumming's cars, which had been taken over the road, were of the same gauge as this, whereas the plaintiff's car had a narrower tread than Cumming's, amounting to half an inch on each wheel, making an inch difference in the tread. And it is alleged that it was these misrepresentations of Wasson which induced the defendants to take the car on its own trucks, and which occasioned its running off the road.

But it is clear that if the agents of the defendants had measured the gauge and tread of the car before putting it on the track, or examined it when on, they would have discovered the precise extent of both gauge and tread. They were, so to say, deceived with their eyes open. The facts were patent — discoverable by inspection or by measurement; and the court said, in substance, that if this was so, it was their own fault if they were deceived. In this there was no error.

When an article is delivered to a common carrier for transportation he must exercise his own judgment as to the mode of carrying it, and cannot shelter himself from the consequences of his common law liability by setting up misrepresentations, unless they respect matters which are latent in their character.¹

KLAUBER v. AMERICAN EXPRESS CO

SUPREME COURT OF WISCONSIN, 1866.

[21 Wis. 21.]

ACTION to recover for injuries done to goods of plaintiff while in possession of defendant as carrier. The goods are described as "a package containing three dozen ten spring skirts, three dozen sixteen spring skirts, and three dozen twenty spring skirts;" and it is alleged that through defendant's negligence they were "water-soaked, rusted and utterly spoiled." Answer, denying negligence on defendant's part, and alleging that the damage arose from the improper manner in which said skirts were packed for transportation.²

¹ See *McCune v. B. C. R. & N. R. R.*, 52 Ia. 600. — Ed.

² The evidence and arguments of counsel are omitted. — Ed.

DIXON, C. J. What is meant when it is said that if goods are improperly packed, the carrier will not be liable for injuries resulting from that cause? Is it meant that if the goods are of a nature to be injured by rain, they must be secured by water-proof covering or cases? It was argued in this case, that because the goods were of that nature, and the shipper did not pack them in wooden boxes or other water-proof covering, so as to guard against the ordinary contingency of rain when they were transferred from cars to wagons, and from wagons to cars or warehouses, in the course of transit, the company is not responsible for the loss, provided that proper diligence was used in transferring them, so that they received as little injury as possible under the circumstances, the company not having previously provided awnings or other suitable means of protection, so as effectually to have avoided the injury. We believe there is no authority for this position, and that the improper packing which will excuse the carrier, signifies some internal or latent defect, of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of handling and transportation. A common carrier is an insurer against all damage to or loss of goods entrusted to him for transportation, except such as may arise from the act of God, the act of the enemies of the country, or the act of the owner himself. If there be some hidden defect in the packing, and damage result from that cause, it is the act of the owner, and the carrier is not responsible. But as to the external protection of the goods, the owner is not required to cover them so as to be safe against the action of rain, or wind, or fire not happening by the act of God. Those are dangers the hazards of which are by law imposed upon the carrier, and they are such that they may, in general, and especially the first, be easily resisted. In this case the company might, with proper care and forethought, very readily have prevented the injury from the rain, while removing the goods from the car to the wagon, and from the wagon to the warehouse. In speaking of rains and winds, we mean of course those ordinary and frequent occurrences in this country not amounting to tempests. Tempests are regarded as the acts of God; and for losses caused by them the carrier is not liable. Losses "by act of God," for which the carrier is excused, have been well defined to be "those losses that are occasioned exclusively by the *violence of nature*; by that kind of force of the elements, which human ability could not have foreseen or prevented; such as lightning, tornadoes, sudden squalls of wind." Against all ordinary occurrences of rain, then, the carrier is bound to provide; and if he does not, and damage ensues to the goods, he must bear the loss, even though the goods might have been so packed or inclosed by the owner as to have prevented the injury. If goods thus liable to injury were to be always so packed as not to be injured in that manner, it would, no doubt, greatly diminish the burthen and responsibility thrown upon the carrier. But the owner is not required so to pack them; and if he does not, the omission is known to the carrier, who is supposed to compensate him-

self for the additional trouble and risk by additional charges for his services. The object of packing is, in general, to secure convenience, safety and despatch in the handling and transportation, and not to prevent injury from such accidental causes as rain happening in the course of transit, against which the carrier is presumed to have provided. The owner may, therefore, if he choose, deliver the goods without any external protection; and if he does, and they are of a nature to be injured by the mere handling and carriage in a careful and proper manner, and are so injured, the loss will be his own; but if they are otherwise injured, by rain or other cause for which the carrier is not excused, the loss will fall upon the carrier.

The case was likewise presented as if it was a question of the degree of diligence exercised by the company and its servants at the time, to prevent the injury. The loss not having been shown to have arisen from one of the excepted causes, it is no matter what degree of care or prudence may have been bestowed at the time; the company is nevertheless responsible for it.

The principles stated in this opinion are so familiar and well settled that, aside from the authorities found in the brief of counsel, we deem it unnecessary to refer to others, except that we note *Forward v. Pittard*, 1 Term, 27; *Friend v. Woods*, 6 Gratt. 189; *Chevallier v. Straham & Straham*, 2 Tex. 115; and *Smith v. Shepherd*. *Abbott on Shipping* (5th Am. ed.), 383, and *Parsons on Contracts* (5th ed.), Vol. 2, note (M), as bearing particularly on the questions considered.

AMERICAN EXPRESS CO. *v.* PERKINS.

SUPREME COURT OF ILLINOIS, 1867.

[42 Ill. 458.]

LAWRENCE J. This was an action on the case, brought by Mary E. Perkins against the American Express Company as a common carrier. There was a trial by the court and judgment for the plaintiff. The plaintiff below delivered to the company a package, containing a wreath, to be taken from Decatur to Cairo. The wreath was partially made of glass, and when it arrived at Cairo the glass was broken. The receipt given by the company to the plaintiff, and put in evidence by the latter, contained a provision that the company would not be responsible "for any articles contained in or consisting of glass." Without holding that the company could discharge itself, by this proviso, from its liability as a common carrier, unless the plaintiff assented to such proviso, we must, nevertheless, hold that such liability, to its common law extent, did not attach, unless the company was informed what the package contained, in order that a degree of care might be used proportioned to its fragile character. The plainest dictates of fair dealing and good faith required the plaintiff to furnish this information. This principle was

settled in the case of the Chicago and Aurora R. R. Co. v. Thompson, 19 Ill. 578, where it was sought to charge a common carrier for the loss of money in a valise, that had been shipped in a box containing other articles of little value. The company was not informed that the box contained money, and its appearance furnished no indication of that fact, but rather the contrary. The court reviews the authorities and holds, that, in order to charge common carriers as insurers, they must be treated in good faith, and that concealment, artifice or suppression of the truth, will relieve them of this liability. It was held the company should have been informed of the money being in the box, in order to charge them. So in this case, the company should have been told of the contents of this box before they can be charged for the breakage of so fragile a substance as glass. That they were so informed there is not a particle of evidence. The judgment is reversed and the cause remanded.

Judgment reversed.

KOONS v. WESTERN UNION TELEGRAPH CO.

SUPREME COURT OF PENNSYLVANIA 1883.

[102 Pa. 164.]

CASE, by Frederick A. Koons, Gustavus Schwarz and Julius Schwarz trading as Koons, Schwarz & Co., against the Western Union Telegraph Company, to recover damages for the alleged negligent and erroneous transmission of a telegraph despatch. Plea, not guilty.

On the trial, before HARE, P. J., the following facts appeared: The plaintiffs were commission merchants doing business in Philadelphia, and were agents for the Little Creek Landing Canning Company, of Little Creek, Delaware, in selling their goods. On August 26th, 1879, plaintiffs sent a telegraphic despatch to James L. Heverin, a manager of said company, at Dover, Delaware, in these words: "Sold two thousand cases Bay View tomatoes, ninety cents. Shall we sell more?" On the same day plaintiffs received by telegraph a reply as follows:

"Dover, Delaware, 8 | 26 | 1879.

"Koons, Schwarz & Co.:

"You can sell ten thousand (10,000) more, same price.

"J. L. HEVERIN."

They proceeded to sell as directed on behalf of their principals, and effected large sales. On August 30th, plaintiffs were informed by Heverin by letter that he had directed them in his despatch, to sell two thousand more, not ten thousand. Plaintiffs were unable to procure the goods to fill their contracts, except at an advanced price, by reason whereof they lost \$2,400, which sum they claimed to recover from the telegraph company.

The original message was put in evidence. Mr. Heverin wrote it in a store in Dover on a piece of note paper, and sent it to the telegraph office by a boy about nine years old, to whom he read it. The operator testified: "A boy by name of John Read brought this message to the office; he threw the message down and said: 'Grandpap has no blanks and to please send it as it is.' I called him back and read it to him as follows: 'You can sell ten thousand more, at same price.' He said, 'That is right; that is the way grandpap read it.'" The message was pasted on a blank in the telegraph office in accordance with a regulation of the telegraph company.

Mr. Heverin was in the habit of sending frequent telegraphic despatches from Dover, and the operator was familiar with his handwriting.

At the close of the evidence counsel for the defendant presented the following points for charge, all which the judge reserved, viz: . . .

"That in writing the message in such wise that the operator would naturally and reasonably believe that the word was *ten* instead of *two*, and sending it by a boy who was incompetent to give an explanation, Heverin was guilty of negligence which would have precluded him from recovery against the telegraph company, and as the plaintiffs were at that time acting as his agents, and made the sale for him, are also precluded by negligence of their principal.

"That there is no evidence of negligence on the part of the defendants, or on which they can be made answerable."

Verdict for plaintiffs for \$2,760.

The court subsequently entered judgment for the defendants on the points reserved, *non obstante veredicto*, whereupon the plaintiffs took this writ of error, assigning for error the above action of the court in entering judgment for the defendants on the points reserved, *non obstante veredicto*.¹

PAXSON, J. We are of opinion that this question was properly reserved, and that in entering judgment *non obstante* thereon in favor of the defendant the court below committed no error. Upon the evidence the learned judge would have been justified in giving the jury a binding instruction to find for the defendants. There was no proof to charge them with negligence, not even a scintilla. Had the order of Heverin to the plaintiffs of August 26th, 1879, been sent by mail instead of by wire, the plaintiffs would have been justified in treating it as an order to "sell ten thousand more, same price." It is immaterial what Heverin intended. As written it is ten thousand if it is anything. It is at least much more like "ten" than "two." If there was any negligence in the case it was on the part of Mr. Heverin in sending an order to sell ten thousand when he only intended to sell two thousand. The defendants are not responsible for Heverin's mistake. Moreover, the question was a proper one for the court.

¹ Part of the statement of facts and of the opinion and the arguments of counsel are omitted. — Ed.

The facts bearing upon it were not disputed. The original of the telegram was before the court, and what was contained therein could only be determined by inspection. That was the duty of the judge who tried the cause. It is difficult to see how a jury could aid him in this matter. They might indeed find that ten meant two, but this would neither aid the judge nor advance the cause of justice.

It was the duty of the defendant company to transmit the message accurately. Having sent it as written, the addition of the figures 10,000 was of no importance. It did not vary the sense of the message. And had the message been repeated it would not have led to the correction of the error, for the reason that it had been sent precisely as written.

The cases are numerous that upon an undisputed state of facts it is the province of the court to pass upon the question of defendant's negligence. It is sufficient to refer to *Hoag v. The Railroad Company*, 4 Norris, 293; *King v. Thompson*, 6 W. N. C. 241; *Central Railroad Company v. Feller*, 4 Id. 160.

Judgment Affirmed.

HART v. CHICAGO AND NORTHWESTERN RAILWAY CO.

SUPREME COURT OF IOWA, 1886.

[69 Ia. 485.]

On the eighteenth day of April, 1883, the plaintiff delivered to defendant, at the city of Des Moines, one car-load of property, which the latter undertook to transport to the town of Miller, in Dakota territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain, a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than \$100 each, unless by special agreement noted on the contract, and no such special agreement was noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to, and did, ride in the car with them. When the train reached Bancroft, in this state, it was discovered that the hay which was carried in the car to be fed to the horses on the trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The train men and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This action was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appeals.

REED, J.¹ I. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant, who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. *Coggs v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 Durn. & E. 27; *Riley v. Horne*, 5 Bing. 217; *Thomas v. Railway Co.*, 10 Metc. 472; *Roberts v. Turner*, 12 Johns. 232; *Moses v. Railway Co.*, 24 N. H. 71; *Rixford v. Smith*, 52 Id. 355. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his

¹ Part of the opinion is omitted. — Ed.

direction, took into the car, and which, at the time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See *Hutch. Carr.*, § 216, and cases cited in the note; also *Lawson Carr.*, §§ 19, 23.

II. Section 1308 of the Code is as follows: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." Counsel for plaintiff contend that the provision of the shipping contract, by which plaintiff undertook to care for the horses while they were being transported, is in violation of this section, and consequently is void. For the purposes of the case this may be conceded, and yet it does not follow that defendant is liable for the loss, if it was caused by plaintiff's act. If it should be conceded that defendant was responsible for the proper care of the property while it was being transported, it would follow only that plaintiff was an intermeddler in placing his servant in the car, and in assuming to care for it. If the injury was caused by his act, it is immaterial whether he was proceeding under a valid contract, or as an officious volunteer, in doing the act.

PENNSYLVANIA CO. v. KENWOOD BRIDGE CO.

SUPREME COURT OF ILLINOIS, 1898

[170 Ill. 645.]

CARTWRIGHT, J. Appellee brought this suit to recover the cost of repairing steel trusses which were broken and injured while being carried by appellant on its railroad from Grand Crossing, in Cook county to South Chicago, in the same county, and on trial obtained a verdict for \$668.62, which was \$109.28 more than the cost of the repairs sued for. Appellee remitted said excess, and judgment was entered for \$558.84, — the amount of the claim. The Appellate Court for the First District affirmed the judgment and granted a certificate of importance, in pursuance of which the case is brought to this court, and appellant complains that improper evidence was admitted and improper instructions given for appellee, and proper evidence offered by appellant excluded.

In December, 1892, plaintiff had its works at Grand Crossing, and was about to make and ship to Schailer & Schniglau, at South Chicago, in the care of the Illinois Steel Company, certain trusses. If they were shipped in parts it would be necessary to rivet them together after they arrived at South Chicago, which would make an additional expense. If they were put together it would make a load higher than defendant would ship, and plaintiff, desiring to ship them in that way to save the added expense, applied to the station agent at Grand Crossing to see if

permission could be obtained to ship in that way. The agent said that he could not permit it and had no right to do so. He was then asked to apply to his superiors for permission, and for the purpose of complying with that request he inquired what the height would be. So far there was no dispute as to the facts, but there was a controversy as to what representation was made concerning the height. The station agent testified that Paul Willis, the secretary and engineer of the plaintiff, pointed to a truss lying on the ground and said it would be the same height as that one; that Willis proposed to measure it, and took a steel tape and held one end and the station agent held the other, and that they measured it and found it was just fifteen feet high. Willis contradicted this testimony, and said that he showed the station agent a drawing of the trusses made on a scale of half an inch to the foot, but did not tell the height. He admitted, however, on cross-examination, that the station agent asked for definite dimensions of the trusses to be shipped, and that thereupon he and the agent measured with a steel tape-line a truss which was lying there in the yard. The truss that was measured was fifteen feet high, and the agent took a memorandum of the height and wrote for the permission. After receiving a reply he told plaintiff that the trusses would be accepted. Plaintiff was accustomed to load the cars in its own yard, where it had a switch, and the defendant hauled them out to its road. The car in question was loaded in that way with trusses sixteen feet and four inches high from the platform of the car. According to its custom the railroad company hauled the car from the yard, and in taking it to South Chicago in its train the trusses were bent and broken in an attempt to go through the Calumet river bridge. The copy of the account sued on, annexed to the declaration, was for repairing trusses wrecked in the Calumet bridge, and it is plain from the record that it was conceded on all hands at the trial that the damage was done by the height of the trusses at the Calumet bridge.

The defendant was not bound to accept for transportation such property as these trusses. It did not, in general, undertake to carry such property and was not prepared to transport anything of that kind. It is conceded that it was not bound to do so, and this was well understood by the plaintiff when the permission was asked as a favor, to save expense to plaintiff. The evidence for the defendant was, that the trusses were wrongfully loaded by the plaintiff to the height of sixteen feet and four inches above the platform of the car, after having represented to the defendant that they would be only fifteen feet in height. When the favor was asked for and the station agent inquired for the definite dimensions and height of the trusses, he was entitled to a fair and honest disclosure, and information which he could give to his superiors. The president of plaintiff testified that the station agent agreed to communicate with one Law, a division superintendent of the road, for the permission, and that the witness told the agent that he could not tell him what the height of the trusses would be. The engineer, Willis, who

drew the plans and knew the facts, according to his account did not give the station agent any height, but referred him to his drawings, and told him that he could scale the drawings if he wanted to. If the testimony for defendant was true there was a distinct misrepresentation. It has always been held that a carrier is not responsible for a loss or injury resulting from the misconduct, fraud or deceit of the owner. (Chicago and Aurora Railroad Co. v. Thompson, 19 Ill. 578; Chicago and Alton Railroad Co. v. Shea, 66 id. 471; Elliott on Railroads, sec. 1491.) In this case the height of the trusses was the direct and proximate cause of the injury. If the permission was given to load them at a height of fifteen feet, so that they would pass under wires and bridges on the road, and they were loaded at a greater height, so that they could not pass under a certain bridge, it would conflict with the plainest principles of justice to permit the plaintiff to recover for the injury resulting from its own fault, unless the defendant had knowledge of the fact. There was no evidence of such knowledge.

But it is insisted that the defendant was bound to inspect the car before taking it on its road, and ascertain the height of the trusses, and to show a fault on the part of defendant in that respect the court permitted in evidence proof that one Kertz, who at the time of the shipment was a clerk for defendant at another station and knew nothing about the occurrence, stated two or three weeks afterward that the car was not inspected before it went out, because the inspector was drunk. The shipment was December 20, 1892, and this man Kertz did not become defendant's agent at Grand Crossing until January 7, 1893. It was after that time that the statement was made. It is a well established rule that the declaration of an agent or servant can only be admitted in evidence if, at the time of making the declaration, he is doing something about the business of his principal. It is because the declaration is a verbal act and part of the *res gestæ* that it is admissible at all, so that if what the agent did is admissible as evidence, what he said about the act while he was doing it is also admissible, but not otherwise. (1 Greenleaf on Evidence, sec. 113; 1 Phillips on Evidence, 201; Jenks v. Burr, 56 Ill. 450; Ohio and Mississippi Railway Co. v. Porter, 92 id. 437; Phenix Ins. Co. v. LaPointe, 118 id. 384; Summers v. Hibbard & Co. 153 id. 102.) In this case Kertz did not even know anything about the supposed facts.

One of the plaintiff's claims seems to have been that the defendant might have taken the car to the steel company's works by some other route, without going through the Calumet bridge, and it is shown that it afterwards took them, when repaired, by some other way. There was no evidence that the defendant had any right, at the time of the shipment, to run over a switch into the yard of the steel company without going over the bridge, and the defendant proved that it had no arrangement at that time by which it was permitted to run cars from its line to such works of the steel company. The court refused to permit the defendant to prove further that it did not own or operate any track

at that time leading from its main line into said works. The evidence was competent, and should have been admitted.

The second instruction given at the request of plaintiff is as follows:

"You are instructed that if you believe, from the evidence, that the car in question was loaded by the plaintiff and received by the defendant so loaded, that then the defendant made the plaintiff its agent for the purpose of loading the car, and it became the duty of the defendant to ascertain that the car was properly loaded when the same was received by it."

The instruction was wrong, as applied to this case. If the duty rests primarily upon the carrier to load and unload freights delivered at its stations or warehouses, there is surely no reason why the shipper may not, by contract express or implied, assume that duty. In this case it was the custom of plaintiff, instead of bringing its freight to the station, to have cars taken into its yard and load them there. Defendant never assumed the duty of loading cars for plaintiff at that place, but the understanding was that plaintiff would load them. Whether this was done to save charges, or for convenience to avoid the labor and expense of delivery at the station, or for whatever reason, the loading was not done by plaintiff as the agent of defendant. The instruction made the defendant responsible for the act of the plaintiff in loading the car so that it would not go through the bridge, on the ground of agency, although the jury might believe that the loading was wrongful. It is also required an inspection at all events, regardless of the question whether the trusses were to be only fifteen feet high, or whether the circumstances were such that defendant had a right to rely upon an understanding that they would be of that height, and not measure them to see whether the understanding had been disregarded. The instruction was wrong.

The sixth instruction given for the plaintiff was as follows:

"The jury are instructed that if, after the car was loaded, an agent or employee of the defendant saw it as it was loaded and made no protest as to the manner of its having been loaded, and if the jury believe, from the evidence, that the goods were not delivered in as good order as when received by the defendant, ordinary wear and tear excepted, and that the plaintiff was injured and has sustained damage thereby, then the plaintiff is entitled to recover, unless the jury believe, from the evidence, that the injury resulted from the act of God or the public enemy."

The trainmen unquestionably saw the car. They could not have hauled it without seeing it, and this instruction was equivalent to a direction for a verdict regardless of all defences. It ignored the alleged agreement as to the height to which the car was to be loaded; and under it, if an agent or employee of the defendant, whether fireman, section-hand or laborer, saw the car and made no protest, defendant would be liable, regardless of the question whether the difference in height would be noticeable to such employee and whether inspection

was within the scope of his employment. It required every employee of defendant to know the exact height of the trusses and the height of the Calumet bridge, and was clearly wrong.

For the errors indicated in admitting and rejecting evidence and giving instructions, the judgments of the Appellate Court and circuit court are reversed and the cause remanded to the circuit court.

*Reversed and remanded.*¹

BOTTUM *v.* CHARLESTON AND WESTERN CAROLINA RAILWAY.

SUPREME COURT OF SOUTH CAROLINA, 1905.

[72 S. C. 375.]

WOODS, J. On May 16, 1903, the plaintiff, Mrs. Bertha C. Bottum, had a lot of her household goods packed by H. B. Graves, a large dealer in furniture and pictures, and shipped by him from Rochester, N. Y., to Greenwood, S. C. One box containing a pastel portrait of Mrs. Bottum's deceased husband and a valuable landscape painting was lost on defendant's road, and this action was brought to recover the value, \$377.50.

Mrs. Bottum's agent, in making the shipment, marked the box containing these pictures "glass, with care." The bill of lading was for "household goods," but the kind of goods in each package, except "three trunks crated," was specified. The box of pictures was included in the description, "3 box glass," the other two boxes really containing glass. The defendant's freight charge on glass was one and one-half times first class. On pictures the charge was three times first class, the value being over \$50 and not exceeding \$200, and a special contract was required when the value was over \$200. These rates and requirements, it seems, had been approved by the Interstate Commerce Commission. The packers testified they had always received from consignors pictures marked as glass, and always so marked them in shipping, but there was no evidence that the defendant or any other railroad ever acquiesced in this misdescription. The defendant denied liability for the value of pictures shipped in a box represented by the marks on the box as glass, for which it charged and received a lower rate of freight.

The Circuit Judge charged: "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box. Now, if Mrs. Bottum was not guilty of any improper concealment of the contents of the box shipped, or the value thereof, it was the right and duty of the railroad company to inquire about the nature and value of the contents of the box; and if it failed to do so,

¹ *Acc. Miltimore v. Chicago & N. W. Ry.*, 37 Wis. 190. — Ed.

and the box has been lost, then the railroad company is liable for the full amount of the loss."

In accordance with this instruction, the verdict was in favor of the plaintiff for the value of the pictures. There are a number of exceptions, but the case turns on the soundness of the proposition just quoted from the charge. It is manifest from the context, that when the Circuit Judge said, "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box," he meant there was no *intention* to defraud by concealment, for the defendant's claim of exemption rested entirely on the ground that it had been deceived as to the contents of the box by the untrue representation of the plaintiff's agent as to a fact recognized by the law as of great importance to the contract of carriage. More definitely, then, the question at issue is, was the Circuit Judge right in charging as a matter of law, that in the absence of actual, intentional fraud, the carrier was liable for the value of pictures marked "glass" on the box and billed as "glass," because it was the duty of the railroad company to make further inquiry about the nature of the contents, and having failed to do so, it could not avail itself of the misdescription?

It is quite true, that when a railroad company receives a package marked "glass," and makes no inquiry as to its kind or value, it is responsible for any article received coming under the general description of glass, but by no possible stretch could a pastel portrait or landscape painting be classed as glass. They may, as in this instance, have glass over them, but the glass cover, like the frame, is incidental, and usually of insignificant value compared to the picture. In marking the box, the shipper expressly represented the box to contain glass, and it was, therefore, not the duty of the carrier to ask for a repetition of the statement, nor to disbelieve it and open the box to see for itself.

It is known to all that for purposes of transportation, goods are classified, and that several factors enter into the consideration, such as weight, bulk, value, and the risk of loss or injury. The carrier has a clear right to know the contents of packages offered for shipment, in order that he may fix his compensation and know his risk. The statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely, and if the value or character of the article actually shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier or the risk or expense of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. This is merely the application of the familiar principle that a party to a contract is held only to that liability which falls fairly within the terms of the contract, and it makes no difference if an item which the other party wished to cover was omitted by his fraud or by his negligence.

It is said in Hutchinson on Carriers, sec. 213: "Fraud may be as

effectually practised upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of the contents, if there be anything in its form, dimensions or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value." 6 Cyc. 380; 2 Kent, *603; Angell on Carriers, sec. 261, 5 Am. & Eng. Ency. Law, 345; Relf v. Rapp, 37 Am. Dec. 528 (Penn.); Orange County Bank v. Brown, 24 Am. Dec. 129 (N.Y.); Pardee v. Drew, 25 Wend. 458; Dunlap v. International Steamboat Company, 98 Mass. 371; Shaahet v. Illinois Central R. Co., 30 S.W. 742 (Tenn.); Humphreys v. Perry, 148 U.S. 627; Southern Express Company v. Everett, 37 Ga. 688, 46 Ga. 307; R. R. Co. v. Thompson, 19 Ill. 578; R. R. Co. v. Shea, 66 Ill. 471; Railway Co. v. Collins, 4 Am. St. Rep. 87 (Ga.); Railway Co. v. Moore, 5 S.E. 769 (Ga.). These authorities, especially the leading case of Relf v. Rapp, are opposed to the instruction given by the Circuit Judge, to the effect that marking and billing the box "glass" was not a representation that its contents were to be classed as glass and not as pictures.

The case of Rathbone v. R. R. Co., 35 N.E. 418 (N.Y.), relied on by respondent, is not applicable. There the bill of lading simply described the property as two boxes of marble, contents and value unknown, and contained a stipulation to the effect that no statutory would be carried by defendant for the loss of which it would be liable, unless a memorandum was delivered, stating the character and kind of articles and their value, unless a proper extra price for the carriage and responsibility was paid. Shippers' agents informed defendant at the time of the shipment that the box contained marble statuary, and this was marked upon the box, also the words, "Handle with care." The statuary was found to be broken on delivery to the consignee, and it was held: "a nonsuit was error; that if defendant was fully and truly informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observance of the conditions; and that plaintiff was entitled to a submission to the jury of the questions of waiver, of fraudulent concealment and of defendant's negligence." There was, therefore, actual notice to the carrier of the contents of the box, which, as the Court held, was obviously evidence of waiver of the conditions of the bill of lading. Here we perceive nothing to put the carrier on notice that the mark on the box did not

truly state the nature of the contents, but even if there was such evidence, it was the right of the defendant to have the question of waiver submitted to the jury.

The defendant offered evidence tending to show that the misrepresentation as to the contents of the package materially affected the burden and the consideration of the contract of carriage, and no evidence to the contrary was offered by the plaintiff. On principle supported by the authorities above cited, the plaintiff was entitled under the evidence offered to recover as for the loss of a package of glass used for household purposes, the reasonable value to be fixed by the jury, and it was, therefore, error for the Circuit Judge to charge, as in effect he did, that the verdict should be for the plaintiff for the value of the pictures.

There was no error in admitting testimony as to the contents of the box; without it the case could not be intelligibly tried.

The judgment of this Court is, that the judgment of the Circuit Court be reversed, and the cause remanded for a new trial.

NEW YORK CENTRAL RAILROAD *v.* GOLDBERG.

SUPREME COURT OF THE UNITED STATES, 1919.

[*Reported 39 Sup. Ct. Rep. 402.*]

PITNEY, J. This was an action brought by respondent against petitioner in the Supreme Court of New York to recover damages equivalent to the value of certain goods shipped in interstate commerce and lost in transit. Plaintiff had judgment in the trial court, which was affirmed by the Appellate Division for the First Department (*Goldberg v. New York Cent. R. Co.*, 164 App. Div. 389, 149 N. Y. Supp. 629), and affirmed by the Court of Appeals without opinion (221 N. Y. 539, 116 N. E. 1047).

The facts are as follows: On September 17, 1912, a firm of fur manufacturers in New York City caused to be delivered to defendant there for transportation to plaintiff at Cincinnati, Ohio, a case containing furs belonging to plaintiff of the value of \$693.75. When the case left the consignors' possession it was marked with the name and address of the consignee, and with the word "furs" conspicuously displayed. It was delivered to a local expressman, whose driver delivered it to defendant and made out a bill of lading which defendant signed and upon which the action depends. This bill of lading described the goods as "One case D. G.," which admittedly means "dry goods." The misdescription was the driver's mistake, not made with any intent to fraudulently misrepresent the nature of the merchandise shipped. Defendant's clerk who signed the bill of lading relied wholly upon the representations of the driver as to the contents of the case,

not seeing the case itself; and, so far as appears, no representative of defendant compared or had a convenient opportunity to compare the bill of lading with the marks on the case. At the time of the shipment the official freight classification filed with the Interstate Commerce Commission provided for a first-class rate for dry goods (65 cents per hundred pounds), and a double-first-class rate (\$1.30 per hundred) for furs. As a result of the misdescription in the bill of lading, freight was charged at the smaller rate applicable to dry goods, instead of the higher one applicable to furs. No valuation was placed upon the goods, and no question of limitation of liability to a stipulated value is presented.

Defendant admitted that it received the goods for transportation, and that they were stolen in transit and never delivered to the consignee.

Defendant insists that it is not liable in any amount for loss of the goods, because they were misdescribed in the bill of lading. Reliance is placed upon a line of decisions in this court relating to the limitation of liability of an interstate rail carrier where goods are shipped at a declared value at a rate based upon value and under a contract conforming to the filed tariff. *Adams Express Co. v. Croninger*, 226 U. S. 491, 509, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Kansas City Southern Ry. v. Carl*, 227 U. S. 639, 650, *et seq.*, 33 Sup. Ct. 391, 57 L. Ed. 683; *Missouri, Kans. & Texas Ry. v. Harriman*, 227 U. S. 657, 670, 33 Sup. Ct. 397, 57 L. Ed. 690; *Great Northern Ry. v. O'Connor*, 232 U. S. 508, 515, 34 Sup. Ct. 380, 58 L. Ed. 703; *Atchison, etc., Ry. Co. v. Robinson*, 233 U. S. 173, 180, 34 Sup. Ct. 556, 58 L. Ed. 901; *Southern Railway v. Prescott*, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836.

The Appellate Division held that these cases did not go to the extent of relieving the carrier from all liability in case of a non-fraudulent misrepresentation as to the nature of the merchandise shipped, and that since there was no clause in the bill of lading exempting the carrier or limiting its liability in case of such a misdescription the carrier was defenceless.

Defendant's contention is that there is no responsibility for loss of the furs that were shipped because they were goods, not of the same, but of a different, character than those described in the bill of lading, and were goods for the transportation of which a higher rate was established by its filed schedules. Were there otherwise any difficulty in answering this contention, it would be wholly relieved by the fact that the precise contingency was anticipated in the preparation of the form of the bill of lading and provided for by one of its conditions, which reads as follows:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles

shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Clearly, the effect of this is that a misdescription of the character of the goods, not attributable to fraud, merely imposed upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped, and did not affect the liability of the carrier for a failure to deliver the goods.

Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILROAD *v.*
WISCONSIN.

SUPREME COURT OF THE UNITED STATES, 1915.

[238 U. S. 491.]

MR. JUSTICE LAMAR, delivered the opinion of the court.

There have been two statutes in Wisconsin relating to letting down the upper berth when the lower was occupied. The first¹ left the matter to the decision of the occupant of the lower berth. The second² absolutely prohibits the upper from being let down before it is engaged or occupied.

Concerning the act of 1907, which provided that the occupant of the lower "should have the right to direct whether the unoccupied upper should be opened or closed," the Supreme Court (*State v. Redmon*, 134 Wisconsin, 89, 103) held that the statute was "not a police regulation, but an unwarranted interference with property rights; an attempt . . . to give any person at his option who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof; an obvious . . . attempt, . . . to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guarantee that no person shall be . . . deprived of life, liberty or property without due process of law." . . . "It follows that the arbitrary appropriation in the name of law of the space of an upper berth in a sleeping car for the greater comfort and safety, as regards the health of the occupant of the lower berth at his option, . . . is highly oppressive. . . ."

¹ "An act . . . relating to the health and comfort of occupants of sleeping-car berths.

"Sec. 1. Whenever a person pays for the use of a double lower berth in a sleeping-car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction." Laws of 1907, c. 266.

² "1. Whenever a person shall engage and occupy a lower berth in a sleeping-car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied." Laws of 1911.

But the language of the Act of 1911, now under review, does not remove the fundamental objection to that class of legislation. For as the State could not authorize the occupant of the lower berth to *take* salable space without pay, neither can the present statute compel the Company to *give* that occupant the free use of that space until it is actually purchased by another passenger. The owner's right to property is protected even when it is not actually in use, and the Company cannot be compelled to permit a third person to have the free use of such property until a buyer appears.

While this principle is recognized, it is said that this Act of 1911 was not passed for the purpose of benefiting the occupant of the lower berth, but as a health measure and in the interest of all the occupants of the car. But the statute does not purport to be a health measure, and cannot be sustained as such. For if lowering the upper berth injuriously interfered with the ventilation of the car and the health of the passengers it would follow that upper berths should not be lowered; and if it was harmful to let down the uppers it would be even more harmful to permit additional passengers to come into the car and occupy them. The testimony of witnesses and common knowledge coincide with the trial court's finding of fact that the lowering of upper berths does not endanger the lives, health or safety of persons occupying the lower berth and that keeping the upper closed will add to the comfort of the public generally. *Lake Shore &c. Ry. v. Smith*, 173 U. S. 692. There are some inconveniences and discomforts incident to travelling on a sleeping-car, but none of those resulting from the lowering of the upper berth are of a character that can be treated as a nuisance either in law or in fact. For lowering the upper berth is not only not treated as a nuisance or a serious inconvenience and discomfort to passengers, but the language of the statute itself recognizes that the sleeping-car company might lawfully sell all of the upper berths and have each of them occupied. The same is true of the order of the State Commission fixing a rate of \$1.50 for the lower berth, \$1.20 for the upper berth, and \$2.70 for the section. This treats that the space in the section is salable, as a whole or in parts; and, if the space is thus lawfully salable, it is property entitled to protection.

The State Supreme Court cited *Lawton v. Steele*, 152 U. S. 133; *Lake Shore & M. S. Ry. v. Ohio*, 173 U. S. 285; *Atlantic Coast Line v. North Carolina Corp. Comm.*, 206 U. S. 1; *New York, N. H. & H. R. R. v. New York*, 165 U. S. 628; and after discussing the extent of the police power and the conditions under which it can be exercised, held that it was a reasonable exercise of such power to prohibit the upper berth from being lowered if not engaged or occupied, saying that "if compliance with this [statutory] command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate

adjusted to meet this burden." But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the Company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. *Sweet v. Rechel*, 159 U. S. 380, 400.

The plaintiff also insists that the requirement that the upper berth should not be let down until actually engaged also deprives the Company of its right of management and prevents it from conducting its business so as to secure the privacy of the man or woman occupying the lower berth. It is not necessary to refer to the evidence on that subject because it is a matter of common knowledge that to let down the upper berth during the night would necessarily be an intrusion upon the privacy of those occupying lower berths. For the glare of the lights and the noise of lowering the upper berth would disturb any except the soundest sleepers. In this respect the statute would lessen the ability of the Company to furnish the place of sleep and rest which it offers to the public. A sleeping car may not be an "inn on wheels," but the operating company does engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the Company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public. The right of the State to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation. *Lake Shore & Michigan Ry. v. Smith*, 173 U. S. 684; *Northern Pacific Ry. v. State of North Dakota*, 236 U. S. 585; *State of Washington, ex rel. Oregon R. R. v. Fairchild*, 224 U. S. 510, 529; *Missouri Ry. v. Nebraska*, 164 U. S. 403, 417; *Great Northern v. R. R. Commission*, 238 U. S. 340.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES, dissent.

MALONE v. ST. LOUIS-SAN FRANCISCO RAILWAY.

COURT OF APPEALS, MISSOURI, 1919.

[213 S. W. Rep. 864.]

STURGIS, P. J.¹ The plaintiff sues for injuries received while a passenger on one of defendant's trains by being struck in the eye by a piece of coal or cinder. . . . All that the plaintiff was able to show is that

¹ Part of the opinion is omitted. —Ed.

he was sitting next to an open window while the train was standing on the side track at the station of Thayer; that it was after midnight, and another train or engine passed on the main track, going some 15 to 20 miles per hour; that just as the engine passed the window plaintiff turned to look in that direction, but not putting his head out the window, and something struck him violently in the left eye. The missile dropped in his lap, and was picked up and preserved by plaintiff. It is described as a hot coal cinder or clinker more than an inch in length and breadth. Plaintiff's eye was bruised, burned, and bloodshot, and there is no question but that plaintiff was struck violently by this cinder being thrown violently through the window from the direction of and just as the other engine passed. The proximity and position of the passing engine strongly negatives the possibility of its coming from any other source. . . .

Under such facts, does the presumption arise that the injury is due to defendant's negligence thereby casting the burden of proof on defendant to show the contrary? We think the authorities so hold, the jury being required to first find that the missile was thrown from or by the passing engine.

4 Elliott on Railroads, § 1644, says:

"So, where a missile came through the window and struck a passenger, and there was no showing as to where it came from, it was held that there was no presumption of negligence on the part of the company."

The first case there cited (*Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601) is almost exactly in point on the facts, and the court held that there was a case for the jury, it being first required to find that the missile striking plaintiff came from the passing engine, and not some outside source. The court said:

"When a passenger is injured by any accident connected with the means or appliances of transportation, there naturally arises a presumption that it must have resulted from some negligent act of omission or commission of the company or some of its employes, because, without some such negligence, it is very improbable that the accident would have occurred. . . .

"If the case had been submitted to the jury on the evidence and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employes had anything whatever to do, that would have raised *prima facie* a presumption of negligence on the part of the company, and thrown upon it the burden of proving that it did not exist."

In the other case cited (*Thomas v. Railroad*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416) the court held there was no presumption of negligence where a passenger was injured in a similar way, but there was

nothing to show that the missile causing the injury was thrown from or by defendant's engine or other appliances of transportation. The court there stated the law thus:

"The rule appears to be that, where a passenger is injured either by anything done or omitted by the carrier, its employes, or anything connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence."

See *Woas v. St. Louis Transit Co.*, 198 Mo. 664, 96 S. W. 1017, 7 L. R. A. (N. S.) 231, 8 Ann. Cas. 584. The law is stated in *Hutchinson on Carriers*, §§ 1413 and 1414, thus:

"Whenever it appears that an accident from which the passenger has received an injury was connected with the means or the instrumentalities used in the transportation, a prima facie presumption will at once arise, founded upon the probability that if the utmost care, skill, and diligence had been exercised the accident would not have happened, that it was occasioned by the carrier's negligence. The burden of proof will consequently be upon the carrier to show that he was not at fault. . . . So where it is shown that the injury was caused by a spark from one of the company's locomotives, or by a block of coal which was thrown from the tender of an engine while it was passing the depot platform, or by the explosion of a locomotive boiler, the law will presume from the mere happening of the injury that the company was guilty of negligence."

See, also, on this distinction, 5 R. C. L. § 716.

It is held in *Irwin v. Louisville & N. R. Co.*, 161 Ala. 489, 50 South. 62, 131 Am. St. Rep. 153, 18 Ann. Cas. 772, that there is no liability where a passenger is injured by a missile thrown through a window by a third party not connected with the carrier. In *Texarkana & Ft. S. Ry. Co. v. O'Kelleher*, 21 Tex. Civ. App. 96, 51 S. W. 54, it is held that where a person was injured by a hot cinder striking his eye, and that such cinder was too large to have escaped through the spark arrester of the passing engine, this is evidence of a negligent defect. In *Louisville & N. R. Co. v. Reynolds* (Ky.), 71 S. W. 516, the court held that a presumption of negligence on the part of the carrier arose from proof that a piece of coal was thrown from the tender of a passing engine striking and injuring a passenger on the station platform. In *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797, it is held that where plaintiff, a passenger, carries the burden of showing that he was injured by a cinder escaping from defendant's engine, then the presumption of negligence arises, and the burden is on defendant to show not only proper equipment and appliances, but "that there was no negligence in the operation of the train." The case of *Spencer v. Chicago, M. & St. P. Ry. Co.*, 105 Wis. 311, 81 N. W. 407, is a curious case, in that a woman passenger sitting by an open window of a passenger coach, nearly or quite asleep, was struck by a stream of dirty

water, injuring her ear and doubtless causing much mental pain and anguish. The court held that the mere proof of injury to a passenger was not enough, but "the evidence must go further, and tend in some tangible way to show that the accident resulted from something connected with the operation of the railway." The court in effect held that if there was any substantial evidence that the water came from defendant's water tank, then there would be liability, unless negligence was disproved; but no such evidence was produced. The case of *Missouri, K. & T. Ry. Co. v. Orton*, 67 Kan. 848, 73 Pac. 63, holds that where a passenger is injured by a cinder escaping from the engine the jury may acquit the defendant of liability by finding that there was no negligence as to the construction and equipment of the locomotive and as to its management and operation. Under these authorities, therefore, we must hold that there was sufficient evidence in this case to warrant a finding that plaintiff, a passenger, was injured by a coal cinder coming from the defendant's engine; that this cast on the defendant the burden of disproving negligence, both as to the equipment and appliances and in the management and operation of such engine by its agents and servants. We do not think that the evidence offered by defendant is conclusive in its favor in this respect. The court properly overruled defendant's demurrer to the evidence. In so holding we agree that the carrier is not an insurer of the safety of the passenger; that its liability depends on negligence, which plaintiff must prove; that the mere fact that a passenger is injured does not raise the presumption of negligence; but that when a passenger is injured, and the injury is shown to be connected with the appliances of transportation, then the proof is sufficient to raise the presumption of negligence, and this must be rebutted by the carrier in order to escape liability.

CHAPTER VI.

END OF UNDERTAKING.

NORWAY PLAINS CO. v. BOSTON AND MAINE RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1854.

[1 *Gray*, 263.]

SHAW, C. J. The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees, and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adopted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the busi-

ness of an active community ; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them ; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston, in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester (N. H.), the one October 31st, 1850, and the other November 2d, 1850.

By the facts agreed it appears, that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday the 2d of November, and were then taken from the cars, and placed in the depot or warehouse of the defendants ; that no special notice of their arrival was given to the plaintiffs or their agent ; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods, that they were ready for delivery, at least as early as Monday morning, the 4th of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November ; the cars arrived late ; Ames, the truckman, knew from inspection of the way-bill that the goods were on the train, and waited for them some time, but could not conveniently receive them that afternoon, in season to deliver them at the places to which they were directed, and for that reason did not take them ; in the course of the afternoon they were taken from the cars and placed on

the platform within the depot; at the usual time at that season of the year, the doors were closed. In the course of the night the depot accidentally took fire, and was burnt down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care, on the part of the railroad corporation, or their agents or servants.

We understand the merchandise depot to be a warehouse, suitably inclosed and secured against the weather, thieves, and other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses, used for the storage of merchandise; that it is furnished with tracks, on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track, on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot, there to remain a reasonable and convenient time, without additional charge, until called for by parties entitled to receive them.

The question is whether, under these circumstances, the defendants are liable.

That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can be only justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is, to ascertain the precise limits of their liability. This was done to a certain extent in this court, in a recent case, with which, as far as it goes, we are entirely satisfied. *Thomas v. Boston & Providence Railroad*, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods, during the transit, except those arising from the act of God or a public enemy. It is not necessary now to inquire into the weight of those considerations of reason and policy, on which the rule is founded; nor to consider what casualty may be held to result from an act of God, or a public enemy; because the present case does not turn on any such distinction. It is sufficient therefore to state and affirm the general rule. In the present case, the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of the company, though the goods remained in their custody. If, at the time of the loss, they were liable as common carriers, they must abide by the loss; because, as common carriers, they were bound as insurers to take the risk of fire, not caused

by the act of God, and in such case, no question of default or negligence can arise. Proof that it was from a cause for which they, neither by themselves nor their servants, were in any degree chargeable, could amount to no defence, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by an accidental fire, not caused by the default or negligence of themselves, or of servants, agents or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J. in *Hyde v. Trent & Mersey Navigation*, 5 T. R. 397. "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of rails, on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course, it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of opinion, that

the duty assumed by the railroad corporation is — and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them — that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or, if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties, when not altered or modified by special agreement, the effect and operation of which need not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities; first, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule, that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence. Indeed, the same doctrine is distinctly laid down in *Thomas v. Boston & Providence Railroad*, 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of *Gar-side v. Trent & Mersey Navigation*, 4 T. R. 581, and *Hyde v. Trent & Mersey Navigation*, 5 T. R. 389. See also *Van Santvoord v. St. John*, 6 Hill, 157, and *McHenry v. Philadelphia, Wilmington & Baltimore Railroad*, 4 Harring. 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place, and all precautions necessary to the safety of the

goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers, to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule render it fit and applicable, that is, during the transit; and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle, thus adopted, is not new; many cases might be cited; one or two will be sufficient. Where a consignee of goods, sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon office, or warehouse of the common carrier, it was held, that the transit was at an end, when the goods were received and placed in the warehouse. *Rowe v. Pickford*, 8 Taunt. 83. Though this was a case of stoppage *in transitu*, it decides the principle. But another case in the same volume is more in point. *In re Webb*, 8 Taunt. 443. Common carriers agreed to carry wool from London to Frome, under a stipulation, that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse, until the consignee was ready to receive it. Wool thus carried, and placed in the carriers' warehouse, was destroyed by an accidental fire; it was held, that the carriers were not liable. The court say, that this was a loss which would fall on them, as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time, when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered; or if, for any reason, the consignee is not there ready to receive them; it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars, the company are liable, as warehousemen, or keepers of goods for hire.

It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees, of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of

both parties. The arrivals of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods, or single article, forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case, to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable, that persons, frequently forwarding goods, have a general agent, who is permitted to inspect the way-bills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice, for persons forwarding goods, to give notice by letter, and inclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies, produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be, to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee in the way-bill, as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver no doubt is, to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is *prima facie* the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case, it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot, before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not

stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case, and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied for passenger cars; so that goods may arrive and be unladen, at an unsuitable hour in the night, to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties, and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit. If therefore, for any cause, the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses, at which he was to deliver them; that is, not early enough to suit his convenience. But, for the reason stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground.¹

Judgment for the defendants.

MOSES v. BOSTON AND MAINE RAILROAD CO.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1856.

[32 N. H. 523.]

SAWYER, J.² . . . The inquiry then is, at what moment after the goods conveyed by a railroad company to their cars have reached the point on the line of the railroad where they are to be delivered, may the reasons upon which the common law liability of the carrier is founded be said to cease when there is no person present at their arrival authorised to receive them, and ready to take them away.

That it is the duty of the consignee to come for them is clear, but it would be quite as impracticable for him to be at the place of delivery at the precise moment of their arrival, or of their being unladen from the cars, without actual notice to him of their arrival, as it would be for the company to diverge from their line of road in order to deliver them at his place of business, or to send notice to him of their arrival,

¹ *Acc.* Bausemer v. Toledo & W. Ry., 25 Ind. 434; Gashweiler v. Wabash S. L. & P. Ry., 83 Mo. 112; Chalk v. Charlotte C. & A. R. R., 85 N. C. 423; McCarty v. New York & E. R. R., 30 Pa. 247; Butler v. East Tenn. & V. R. R., 8 Lea (Tenn.), 32.

In Illinois there must be some distinct act of warehousing. Chicago & R. I. R. R. v. Warren, 16 Ill. 502. *Acc.* McHenry v. Philadelphia W. & B. R. R., 4 Harr. (Del.) 448; Mohr v. Chicago & N. W. R. R., 40 Ia. 579. — Ed.

² Part of the opinion is omitted. — Ed.

before proceeding to unload them. The arrival may be in the night, or after the expiration of business hours at the station, or at so late a period before it as to render it impossible for him to get them away within the hours of business. If under such circumstances they have been removed from the cars and placed in the warehouse, it cannot be said that they are so placed and kept there until the gates are opened, and business resumed upon the following day, for any purpose having reference to the convenience and accommodation of the owner or consignee, nor can the proceeding upon any sound view be considered as equivalent to a delivery. The same persons — the servants of the company — continued in the exclusive possession and control of the goods as when they were on their transit, and they are equally shut up from observation and oversight of all others. The consignee has had no opportunity to know that they have arrived and in what condition, and is in no better situation to disprove the fact, or to question any account the servants of the company having them in charge may choose to give of what may happen to them after they are so removed from the cars, or what has happened prior thereto, than before. If purloined, destroyed, or damaged by their fraud or neglect, subsequently to their removal and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually *in transitu* — the declarations of the servants of the company — they having, it may well be supposed, feelings and interests adverse to him, and knowing that he has no evidence at command from other sources to impeach their statement. It is obvious, too, that the opportunities and facilities for embezzling the goods and for other fraudulent or collusive practices, must continue to be equally tempting after their removal under such circumstances, as before. The risk of detection in some respects may be made even less than before, by the greater facilities which the servant of the company in charge of the warehouse has of manufacturing evidence of a burglary or creating proof of the destruction of the goods by fire, set by himself for the purpose of concealing his agency in their larceny. For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give to them any oversight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see, by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in the course of transportation. The same broad principles of public policy and convenience upon which the common law liability of the carrier is made to rest, have equal application after the goods are removed into the warehouse as before, until the owner or consignee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who

thus continue to retain them in charge, by holding that they shall continue subject to the risk.

It is no satisfactory answer to this view to say that the company, having provided a warehouse in which to store the goods for the accommodation of the owner, after the transit has terminated, may be regarded, by their act of depositing them in the warehouse, as having delivered them from themselves as carriers, to themselves as warehouse-men. The question still is, when, having a proper regard to the principles which lie at the basis of their carrier liability, and to the protection and security of the owner, can this transmutation of the character in which they hold the goods be said to take place, and this constructive delivery to be made. If this is held to be at any point of time before there can be opportunity to take them from the hands of the company, then may the owner be compelled to leave them in their possession under the limited liability of depositaries, or bailees for hire, contrary to his intention, and without any act or neglect on his part which may be considered as indicative of his consent thereto. It may have been his intention to take them from their possession at the earliest practicable moment, for the reason that he may not be disposed to entrust them to their fidelity and care without the stimulus to the utmost diligence and good faith afforded by the strict liability of carriers. If he neglects to take them away upon the first opportunity that he has to do it, he may be said thereby to have consented that they shall remain under the more limited responsibility. But upon no just ground can this consent be presumed when his only alternative is to be at the station where they are to be delivered at the arrival of the train, at whatever hour that may happen to be, whether in the night or the day, in or out of business hours, and regardless of all the contingencies upon which the regularity of its arrival may depend. It is to be supposed that the consignee has been advised by the consignor of the fact that the goods have been forwarded, and that he has taken or is prepared to take proper measures to look for them upon their arrival, and to remove them as soon as he can have reasonable opportunity to do so. It must be supposed, too, that he is informed of the usual course of business on the part of the company, and of their agents, in the hours established for the arrival of the trains, and in unloading the cars and delivering out goods of that description, and that he will exercise reasonable diligence in reference to all these particulars, to be at the place of delivery as soon as may be practicable after their arrival, and take them into his possession. The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience and accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away. If his particular circumstances require a more extended oppor-

tunity, the goods must be considered after such reasonable time as but for those peculiar circumstances would be deemed sufficient to be kept by the company for his convenience, and under the responsibility of depositaries or bailees for hire only.

In the case now under consideration, there was conflicting evidence as to the time when the train by which the wool was carried arrived at the depot in Boston. The evidence on the part of the defence tended to show that it arrived at the usual time — between one and two o'clock in the afternoon; while that of the plaintiff tended to show that it did not arrive until three o'clock. The gates of the depot were closed at five, and from two to three hours were usually required for unloading the cars. Upon the view of the evidence most favorable to the defendants, there was but a period of from three to four hours, at the longest, for the consignee to have come and taken away the wool, before the gates were closed; and it was destroyed before they were reopened for the purpose of delivering out the goods. This view proceeds upon the supposition that the work of unlading the cars was commenced immediately upon their arrival; and in the process of unloading, ordinarily occupying from two to three hours, the wool happened to be the first article taken from the cars and was at once ready for delivery. Upon a view less favorable to the defendants, the jury might have found, upon the evidence in the case, that the train arrived at three, and that the wool was unloaded at six — one hour after the closing of the gates. That the verdict in answer to the second question submitted to the jury was therefore warranted by the evidence, is quite clear; and as there are no legal exceptions to the proceedings upon the trial, so far as they relate to this point, the answer of the jury to that question establishes the fact that the consignees had no reasonable opportunity, after the wool was taken from the cars, to come and inspect it, so far as to see whether from its outward appearance it corresponded with the letter of advice from their consignor, and to remove it before it was destroyed. This fact being established, upon the views of the law entertained by the court the transit had not terminated, and the defendants continued liable for the wool as carriers down to and at the time of the loss; and the general verdict entered for the plaintiff may well be sustained upon the original and the second and fourth amended counts.

We are aware that this view of the liability of railroad companies as carriers conflicts with the opinion of the Supreme Court of Massachusetts, as pronounced by the learned chief justice of that court in the recent case of *Norway Plains Co. v. these defendants*, 1 Gray 263. In that case it was held that the liability as carriers ceases when the goods are removed from the cars and placed upon the platform of the depot, ready for delivery, whether it be done in the day time or in the night — in or out of the usual business hours — and consequently irrespective of the question whether the consignee has or not an opportunity to remove them. The ground upon which the decision is based would seem to be the propriety of establishing a rule of duty for this class

of carriers of a plain, precise and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such character is not to be doubted; but with all our respect for the eminent judge by whom the opinion was delivered, and for the learned court whose judgment he pronounced, we cannot but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes.

It is unnecessary, then, to consider the exceptions taken upon the other view of the case, as an action against the defendants for negligence in their care of the wool after their liability as carriers had ceased.

*Judgment upon the verdict.*¹

FENNER v. BUFFALO AND ST. LOUIS RAILROAD CO.

COMMISSION OF APPEALS, NEW YORK, 1871.

[44 N. Y. 505.]

ON or about the 24th of May, 1861, certain household furniture, belonging to the plaintiff, was delivered to the defendant, marked and directed to F. P. Fenner, Dunkirk, N. Y., and the defendant carried said furniture over its railroad to Dunkirk. The furniture was in fact in course of transportation to Sinclairville, Chataqua County, N. Y., a place a short distance from Dunkirk, but this fact was not known to defendant until after the arrival of the furniture at Dunkirk.

The furniture arrived at Dunkirk during the afternoon of May 24th, and was unloaded and placed in a suitable freight-house of the defendant. During the latter part of the same afternoon, Alfred Austin, a teamster, engaged in the business of carrying goods by team between Dunkirk and Sinclairville, who was authorized by the plaintiff to obtain the furniture for her, called at the office of the defendant at Dunkirk with his team, and asked for the furniture, and having ascertained that it had arrived, paid the freight thereon and signed a receipt therefor. He then went to the employee of the defendant, whose business it was to attend to the delivery of the furniture, and found him engaged in the delivery of goods to other parties. It was then nearly six o'clock, the hour at which the freight-house was ordinarily closed; and Austin having occasion to be in Dunkirk the next morning for other goods, it was

¹ *Acc. Bowdon v. Atlantic C. L. Ry.* 148 Ala. 29 (see *Collins v. Alabama G. S. R. R.*, 104 Ala. 390, statutory); *Graves v. Hartford & N. Y. S. B. Co.*, 38 Conn. 143; *Jeffersonville R. R. v. Cleveland*, 2 Bush (Kv.), 468; *Burr v. Adams Exp. Co.*, 71 N. J. Law, 263; *Blumenthal v. Brainerd*, 38 Vt. 402; *Berry v. R. R.*, 44 W. Va. 538; *Wood v. Crocker*, 18 Wis. 345. See *Spears v. Spartanburg U. & C. R. R.*, 11 S. C. 158. — ED.

then and there arranged between him and the employee, for their mutual convenience, that he should not wait for the furniture, but should call therefor the next morning.

During that night the freight-house was burned, and the furniture was wholly consumed, without any fault or negligence of the defendant.

The plaintiff thereafter commenced this action to recover the value of the furniture, and the same was put at issue and referred. Upon the trial, in 1865, before the referee, the foregoing facts appeared, and the referee held and decided that the defendant was liable for the furniture as a common carrier, and gave judgment for the plaintiff for the value thereof. From this judgment the defendant appealed to the General Term of the seventh district, and from judgment of affirmance there to this court.

The case below is reported, 46 Barbour, 103.

EARL, C.¹ . . . The courts below defeated the defendant in this case, upon the erroneous assumption that it was an intermediate carrier, within the meaning of the cases first above cited, and, hence, that this case was controlled by the principles laid down in those cases. The contract of an intermediate carrier is to carry the goods to the end of his route, and there deliver them to the next carrier for further transportation. The contract of the final carrier is to transport the goods to their place of destination, and there deliver them to the consignee or owner; and such was the contract in this case. Here the goods were consigned to F. P. Fenner, Dunkirk, and defendant undertook to carry them to Dunkirk, and there deliver them to the consignee, and it had no duty whatever as to their further transportation. It was the duty of the plaintiff, or her consignee, to take the goods at Dunkirk, and see to, or arrange for, their further transportation. The defendant, in this case, was no more an intermediate carrier than the defendant in the case of *Northrop v. The Syracuse, Binghamton and New York Railroad Company*. The rule to be applied to this case, then, is the one that is applicable to carriers who carry goods to their final destination. This rule is not very definitely determined in this State. In Massachusetts, and some of the other States, it is settled that the moment a railroad carrier carries goods to their final destination, according to its contract, and deposits them in its freight-house, ready for delivery, its liability as carrier ceases, and it remains liable simply as a warehouseman. But this rule has not been adopted in this State, and should not be. It is not always, or generally, practicable for the consignee to be present, on the arrival of the goods, to receive them; and it is just as important that the carrier should continue to be liable, as an insurer of the goods, for a reasonable time after their arrival, until the consignee can have an opportunity to take charge of them, as that it should thus be liable during the transit of the goods to their place of destination.

At an early day, when all the goods were carried upon land in

¹ Part of the opinion is omitted. — Ed.

wagons, it was generally the duty of the carrier to deliver the goods to the consignee personally, or at his place of residence or business. This was so because the carrier could go anywhere with his wagons and make delivery. But carriers upon water, as they were confined by their means of transportation to the water, were bound only to deliver their goods upon the wharf or pier; and if the consignee was present, it was his duty at once to take charge of the goods. If he was not present, but lived at the place of destination, it was the duty of the carrier to give him notice of the arrival of the goods. If he was absent, dead, or could not be found, the carrier discharged his duty by depositing the goods in a warehouse, subject to the order of the consignee. It seems to me that substantially the same rules, and for the same reasons, should be applied to a railroad carrier. It is obliged to stop at the depot, as the water carrier is at the wharf, and unless the consignee is present on the arrival of the goods to take them from the cars, it must, as is the well known and uniform custom, place them in its freight-house. From the drift of the decisions in this State, I think we may fairly infer the following rules as to the delivery of goods at their place of destination by a railroad carrier: If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight-house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The carrier's liability thus applied and limited, I believe, will be found consonant with public policy, and sufficiently convenient and practicable. (See *Powell v. Myers*, 26 Wend. 591; *Fish v. Newton*, 1 Denio, 45; *Jones v. The Norwich and New York Trans. Co.*, 50 Barb. 193; *Roth v. Buffalo and State Line R. R. Co.*, 34 N. Y. 548; *Northrop v. Syracuse B. and N. Y. R. R. Co.*, *supra*.)¹

Within these rules of law, I think the defendant in this case was not liable for the loss of the goods in question. The teamster, Austin, was plaintiff's agent. He had notice of the arrival of the goods, and paid the freight and gave the defendant a receipt for them. Just at that time the railroad employee was engaged in delivering other freight. But there was no refusal to deliver these goods, and, so far as appears, no unwillingness to deliver them; and I think we are bound to infer, that if Austin had demanded the goods, they would have been delivered to him. It was getting late, and as Austin intended to return again the next

¹ *Acc. Walters v. Detroit U. Ry.*, 139 Mich. 303; *Gulf & C. R. R. v. Fuqua* (Miss. 1904), 33 So. 449; Cal. Civ. Code, § 2120.

day, for his convenience, the goods were permitted to remain. I say for *his* convenience. It matters not that it was also for the convenience of the railroad employee, or for their mutual convenience. It is sufficient that Anstin could have had the goods, and that they were left under an arrangement in which he participated, and to which he assented, as much for his convenience as for the convenience of the other party. Suppose the arrangement had been to leave the goods there a week, or a month, for their mutual convenience, would the railroad company have remained liable as a common carrier? Here, then, there is a case where the consignee's agent had notice of the arrival of the goods and had an opportunity to remove them, and he left them in the defendant's freight-house, because it was more convenient for him to call for them the next morning. Under such a state of facts, when the goods were thus left in the freight-house for the mutual accommodation and convenience of both parties, should the law impose upon the one party the responsibility of an insurer? I think not, and that neither justice nor public policy requires that, upon the facts existing in this case, the defendant should be held liable as a common carrier.

I am therefore in favor of reversing the judgments and granting a new trial, costs to abide the event.

CHAPMAN v. GREAT WESTERN RAILWAY CO.

QUEEN'S BENCH DIVISION, 1880.

[5 Q. B. D. 278.]

COCKBURN, C. J. These two cases depend on the same facts and involve the same point. The facts are not in dispute, and lie in a word; but they give rise to a question of considerable importance.

The plaintiff travels about the country with drapery goods. A package of such goods was delivered to the defendants, the Great Western Railway Company, at Bristol, to be forwarded from thence by their line to their station at Wimborne. A second such package was delivered to the defendants, the London and North Western Railway Company, to be forwarded from London to the station of the Great Western Company at Wimborne. Both were addressed to the plaintiff; both were directed "to be left till called for." The one from Bristol arrived on the 24th of March, the one from London on the 25th. On their arrival they were placed in the station warehouse to await their being called for. They had not been called for when, on the morning of the 27th, a fire having accidentally broken out, the warehouse was burned down, and the plaintiff's goods were consumed by fire.

The plaintiff brings his action against both defendants on their liability as common carriers, contending that that liability still subsisted when the goods were destroyed.

The plaintiff was aware that the goods were coming. He called on the 22nd to inquire after them, but found that they had not yet arrived. He called again in the course of the 27th, but the goods had been destroyed that morning.

The question is, whether the goods in question are to be considered as having been in the custody of the defendants as carriers — in which case the defendants would be liable for the loss, though not arising from any default of theirs — or as warehousemen — in which case they would be liable only for want of proper care, which is not alleged to have been the case here. The facts not being in dispute, it was arranged on the trial at *Nisi Prius* that a verdict should pass for the plaintiff for the value of the goods in each case, but that the question of law as to the liability of the defendants should be reserved for the decision of this Court on an application for judgment.

The question of where the liability of the carrier ceases, or rather becomes exchanged for that of an ordinary bailee for hire, is sometimes one of considerable nicety and by no means easy of solution. We are not, however, embarrassed in the present case by any consideration as to an undertaking to forward the goods, such as arose in *Garside v. Trent and Mersey Navigation Co.*, 4 T. R. 582, or as to any obligation on the part of the company to give notice of their arrival, which was one of the points which arose in *Bourne v. Gatcliffe*, 3 M. & G. 643. It is plain that the delivery was to be made at the station to which the goods were addressed, and to the plaintiff himself, or some one duly authorized on his behalf. Nor does any question arise as to the readiness of the defendants to deliver. The goods had arrived safely, and were ready for delivery, had they been called for, down to the time of the fire. It is not suggested that the defendants were under any obligation to give notice to the plaintiff of the arrival of the goods. Nor, indeed, could they have done so. He was not a resident at Wimborne, nor did they know his address. He was going about the country on his business between the time of the arrival of the goods and that of their destruction. No evidence was offered at the trial of any prior course of dealing between the parties, or of any established practice on the part of the railway company in dealing with goods addressed to, and to be delivered at, the station. We have therefore to consider the question with reference to general principles alone.

The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure — sometimes one of considerable duration. Next there is the time which in most instances must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter — which, however, is seldom the case — is on the spot to receive them on their arrival. Where this is not the

case, some delay, often a delay of some hours — as for instance when goods arrive at night, or late on Saturday, or where the train consists of a number of trucks which take same time to unload — unavoidably occurs. In these cases, while, on the one hand, the delay being unavoidable cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of carrier. *A fortiori*, will this be the case where there is unreasonable delay on the part of the carrier, if the consignee is ready to receive.

The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night time, or of which the arrival is uncertain, as of goods coming by sea, or by a goods train, the time of arrival of which is liable to delay. On the other hand, he cannot, for his own convenience, or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance — at all events where the carrier has no means of communicating with him — which was the case in the present instance — cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time. When once the consignee is in *morâ* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such it must depend on the circumstances of the particular case.

Such being the general rule, it is of course competent to the parties to modify that contract by the introduction of any terms or conditions they may please. The question arises whether they have done so, and, if so, to what extent in the present instance. The goods were specially directed “to be left till called for.” What is the meaning of these words? What effect, if any, have they on the contract, as affecting the liability of the defendants? In our opinion none. They amount to no more than an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station. They are words which have been long in use, and had their origin in former times when the carrier generally had his office in the town to which he carried, and was in the habit of delivering at the house or place of business of the person to whom goods were addressed. To prevent goods, which it

better suited the convenience of the consignee to receive at the office of the carrier — more especially when he had no residence or office at the particular place — from being sent out for delivery, and possibly misdelivery, and to ensure their being kept at the office of the carrier ready for delivery, they were specially so addressed. There are still places at which railway companies send out goods from the station. The consignors of the goods now in question were probably unaware whether the defendant company did so at Wimborne, or not. They no doubt knew that the plaintiff did not reside, or carry on business there, except in passing. They were probably aware that he was going about the country with his goods, and that it was uncertain at what precise moment it would suit him to receive them. They therefore directed them to be left at the station till called for — obviously for the plaintiff's convenience, not for that of the company. No doubt some effect must be given to the words. Having contracted to carry the goods subject to the condition of keeping them till called for, the company would be bound to keep them — possibly not for an indefinite, but at all events for a reasonable time. But in what capacity? As carriers or as warehousemen? In our opinion no change in the conditions of liability is introduced by these words. It would be in the highest degree unreasonable that the company, having agreed to keep the goods for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that they undertook to keep the goods till it suited the convenience of the plaintiff to take them away, with the intention of prolonging their responsibility throughout the time whatever it might be. In our opinion, as soon as a reasonable time for delivering had passed, the defendants were fully entitled to treat their responsibility as carriers as at an end, and exchanged for that of warehousemen.

This brings us to the question of what under the circumstances would be a reasonable time. Now, the fire happening on the morning of the 27th of March, one of these packages had been lying at the station since the 24th, the other since the 25th. If the plaintiff, who expected these goods, had called for them on the 26th, and had not had them delivered to him, and had sustained a loss in consequence, he would have had a good ground of complaint against the company, inasmuch as they would then have had full time to unload the goods and to have them ready for delivery. The reason he did not do so was that he was following his business elsewhere; but for which he would have fetched his goods away. It seems to us that there must be a corresponding obligation on his part, and that he was consequently in *morâ* and must put up with the loss, as resulting from his own delay, instead of throwing it on the company.

This view of the case receives support from the decision of the Court of Common Pleas in *Re Webb*, 8 Taunt. 443, which, in principle, is quite analogous to the present case though the facts are not precisely the same. There the defendants, the carriers, in order to obtain their

exclusive custom had agreed with the plaintiffs to store all goods arriving for them in the defendants' warehouse free of charge, till it suited the plaintiffs to take them away. A fire having accidentally broken out, and goods of the plaintiffs, which had been lying at the defendants' warehouse upwards of a month, having been destroyed, it was held that the goods having been in the keeping of the defendants for the convenience of the plaintiffs, the defendants were not liable for the loss. Here, too, the goods were equally in the keeping of the defendants for the convenience of the plaintiff, and the same result must ensue.

Judgment for the defendants.

OUIMIT V. HENSHAW.

SUPREME COURT OF VERMONT, 1863.

[35, 17. 605].

ALDIS, J.¹ The action is case against the defendants, as carriers. There is no count against them for negligence as warehousemen.

The plaintiff was going by railway from Burlington to East Dorset. From Burlington to Rutland he would go by the Rutland and Burlington Railroad, (the defendant's company;) from Rutland to East Dorset, by the Western Vermont Railroad. It does not appear that these roads formed a continuous and connected line. The plaintiff had his box marked for Rutland, and paid for his passage only to Rutland. He arrived at Rutland at half past eleven at night. His box was put upon the platform, and the man who handled and took charge of the baggage there, put the box, with other boxes and trunks, on a wheelbarrow. The plaintiff asked the man, at what hour the cars would go to East Dorset in the morning. He replied,—"at half-past five o'clock." The plaintiff then asked the man if his box would be safe till morning. The reply was,—"it would be safe." The man then started with the wheelbarrow, and went to a baggage room in the depot, into which he put the box, and other baggage and locked up the room. In the morning, at about five o'clock, the plaintiff called for his box, and it could not be found; the baggage master saying that it had probably been taken on the four o'clock train that had left Rutland that morning for Bellows Falls. . . .

We think it is the true rule of the law as to baggage that has reached its final destination, that the railroad company must, upon its arrival, have it ready for delivery upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and that the owner must call for it within a reasonable time, and must use diligence in calling for and removing it. If the

¹ Part of the opinion only is given. — Ed.

owner does not within a reasonable time, and in the exercise of diligence, call for the baggage, then the company should put it in their baggage room and keep it for him, and their custody of it then is only that of warehousemen; and they are discharged from liability as carriers as soon as they have kept it ready for delivery a reasonable time, and it has not been called for. Where trains arrive at such hours that it is the usual course of business at the station to immediately deliver the baggage, and for passengers to immediately receive it, there the reasonable time for which the company should have it ready for delivery, must be limited and governed by the practice and custom of immediate delivery; and in such cases reasonable time and immediate delivery go hand in hand, and "reasonable time" can not extend the delivery to another day or another occasion. We believe it to be the usual custom to deliver and receive baggage not only during what is called the business hours of the day, but upon the arrival of trains in the night, and at almost any hour of the night. The traveller is rarely willing, after arriving at his destination, to leave his baggage at a railroad depot, and the railway companies are usually desirous to despatch business, and be relieved from their responsibility. Hence immediate delivery is the rule as to baggage; and the rule that has been applied to the receipt of freight, that it should arrive during the usual hours of business, and so that the consignee may have an opportunity during the hours of business to see and receive it, does not apply to baggage, which usually accompanies the traveller, and is required by him on arrival. . . .

The rule of law, as to the liability of carriers for the baggage of travellers which has reached its destination, we have already stated; and we are satisfied that the reports, as well as the text of elementary writers, will fully sustain the rule as here expressed. We think, therefore, that as the plaintiff's box was ready for delivery on the platform, and he might have received it and had it removed to a hotel, the lateness of the hour at which the train arrived will not of itself extend the reasonable time within which the plaintiff should call for it to the next morning, so that, it not being called for, the defendants became liable for its custody as carriers. If it was not the usual course of business for the defendants to deliver baggage immediately on the arrival of the train at that late hour of night, or if the railroad company detained the plaintiff's baggage for their own convenience upon the arrival of that train, such facts should have been shown by the plaintiff; and if shown, might vary the defendant's liability for the custody of the property. But we can not presume such facts to exist, and without them the case must stand upon the usual custom of business, and the ordinary rules of law applicable to such state of facts.

THE TITANIA.

CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, 1904.

[131 *Fed.* 229.]

COXE, Circ. J.¹ We agree with the District Judge in holding that, in the absence of any proof to the contrary, the bills of lading sufficiently establish the receipt of the bales in controversy on board the ship at Manila. These bills duly acknowledged the receipt in good order of 1,500 bales of hemp as numbered and marked on the margins "to be delivered in the like good order and condition at the aforesaid port of New York." The libellants have never received the 56 bales which are in dispute in this action. The law applicable to such a situation is clearly stated by the Supreme Court in *The Eddy*, 5 Wall. 481, 495, 18 L. Ed. 486, as follows:

"Delivery on the wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment."

In order to make a valid delivery, which relieves the carrier from liability, it is necessary to show that the goods in question were landed on the wharf, segregated from the general cargo so as to be conveniently accessible to the consignee, that notice was given of their arrival and location and a reasonable time allowed for their removal. Manifestly it is not a good delivery to deposit the entire cargo of the ship on the wharf and inform inquiring owners that if their goods arrived they will be found somewhere in the general mass of merchandise.

There was no actual delivery; this proposition must be conceded. To establish a constructive delivery it was necessary for claimant to

¹ Part of the opinion only is given. — Ed.

show, first, that he separated the libellants' goods from the general bulk of the cargo; second, that he properly designated the goods; third, that he gave due notice to the libellants of the time and place of the delivery. The *Ben Adams*, 2 Ben. 445, 449, Fed. Cas. No. 1,289. There is no proof sufficient to establish any of these essential conditions to relief from liability. The claimant reaches the conclusion that a proper delivery was made by a process of syllogistic reasoning, which may not unfairly be epitomized as follows: If the missing bales were put on board at Manila they were carried safely to New York. All of the bales which reached New York were landed on the Staten Island pier and consignees notified. Ergo the missing bales were constructively delivered to libellants. It is this presumption which the claimant seeks to substitute for proof of delivery, actual or constructive, which he is bound to furnish.

The District Judge sums up the situation as follows:

"The only evidence in the case is that contained in the receipt in the bills of lading; and that binds the ship until it shows by equally cogent proof either that the bills of lading were false, or that it has delivered the goods."

The claimant is in the unfortunate predicament of being called upon for proof and offering conjecture in lieu thereof. The claimant's brief concedes that "the disappearance of the bales in suit, if they were ever on the wharf, cannot be absolutely accounted for in any satisfactory manner," and yet upon him the law imposed the duty of accounting for them.

STEAMBOAT KEYSTONE *v.* MOIES.

SUPREME COURT OF MISSOURI, 1859.

[28 Mo. 243.]

THIS was an action to recover in behalf of the steamboat *Keystone* freight and charges upon certain iron castings shipped by the defendants at St Louis and consigned to Eldridge Bro. & Co., at Wyandott, Kansas territory. It was in evidence that the consignees refused to receive the castings at Wyandott. The boat brought them back to St. Louis. The plaintiff claimed seventy-two dollars freight to Wyandott, seventy-two dollars freight from Wyandott back to St. Louis, and six dollars charges. On the trial the plaintiff introduced two witnesses, who testified that the custom on the Missouri river is to deliver the freight according to the bill of lading, and, when the consignees refuse to receive it and pay charges, to bring it back and notify the shipper and charge the freight also on the back trip. The court gave the following among other instructions: "1. Wherever there is a uniform usage or custom in a particular trade, parties are presumed to contract

in reference thereto, and in such case the usage or custom is understood to form a part of the contract unless it is expressly excluded by them, or unless it be inconsistent with the terms of their agreement."

The jury found for the plaintiff the sum of one hundred and fifty dollars.

NAPTON. J. The custom of returning goods to the place of shipment, where the consignee at the place of delivery has refused to receive them, may be a very reasonable one when the freight is very small in proportion to the value of the goods. In such cases the consignor would probably prefer that the boat should bring them back, and a custom to this effect, as it would be entirely consistent with the consignor's interest, would only show that the carrier, in acting as the agent of the consignor, had discharged his duty and acted as the consignor himself would have done if he had been in a position to be consulted. But where the goods are of a perishable nature, or where the freight constitutes a large proportion of their value at the place of consignment, such a custom would hardly obtain and would certainly be very burdensome to shippers. If a cargo of West India fruit is brought up from New Orleans and the consignee here refuses to receive it, would the carrier be justified in taking it back to New Orleans, at the hazard of losing it entirely and with a certainty that it would be worth greatly less there than here? If a cargo of salt or iron is shipped from here to a point high up the Missouri, shall the boat, in the event that the consignor refuses to receive it, bring it back to St. Louis, where the freight up and down will exceed the full value of iron or salt here? Such a custom, if it exists, would seem to be unreasonable, and could not therefore be acquiesced in by shippers, since it could be productive of no benefit to them. There is no doubt that the boat has a lien on the goods for its freight and is not bound to deliver them up to the consignee until the freight is paid. (3 Kent, 220; *The Schooner Volunteer*, 1 Sumn. 551; *Abbott on Shipping*, 37.) If the consignee refuses to receive the goods, the carrier may deposit them at the place of delivery in a warehouse, with directions to be delivered to the owner upon payment of charges. (*Fisk v. Newton*, 1 Denio, —; *Nagill v. Potter*, 2 John. Ca. 371.) In England the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them until the freight and other charges are paid. (*Abbott on Shipping*, 378.)

The principle upon which the carrier's duty is based, in the event of a refusal of the consignee to receive the goods, is simply to regard himself as an agent for the owners, and as such invested with authority to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges. What he ought to do in a given case will manifestly depend upon the circumstances, and there can be and ought to be no universal rule in course to be followed in all cases. If, acting as agent for the owners, he pursues such course as men of ordinary

prudence would follow, he is protected by the law, whatever may be the result. In the case of *Arthur v. The Schooner Cassius*, 1 Story C. C. 97, Judge Story considered it the duty of the master to land the freight at the port of destination, and, if the consignees refused to receive it, "to place it in the hands of some trustworthy person for the security of his lien for freight, and subject thereto for the benefit and account of the owners." "No right," he adds, "even under such circumstances, could exist on the part of the masters to sell the cargo unless it was perishable and might otherwise have been lost or have perished." If there is no warehouse or no responsible or trustworthy person at the place of consignment, as may happen at some landings on our rivers, the carrier would certainly not be authorized to leave them on the shore exposed to injuries by the weather or by depredations. (*Ostrander v. Brown*, 15 Johns. 39.) In such an event, he is thrown upon the rule to which we have already adverted, of taking such course as will secure his freight, and at the same time advance, as far as ordinary prudence can foresee, the interest of the shipper; and it is quite manifest that if the master lands the goods at the nearest or most convenient port above or below the point of consignment, where warehouses and responsible agents may be found, and apprizes the owners of what has been done, he has discharged his duty, and will not be held responsible for losses, if any should happen. This would undoubtedly be the law, where the cost of transportation entered very largely into the value of the goods at the place of their destination, and where, as a matter of course, the property would be more valuable to the owner at that place than at the place from which they were shipped. If the goods consisted of a package of jewels or of a box of costly articles, whose value was great in proportion to the cost of transportation, it might reasonably be inferred that the refusal of the particular consignee to whom they were forwarded to receive them would justify and perhaps require the carrier to return them to the consignor. Such course would be justified on the same principle which would authorize the carrier to leave goods of another description in a warehouse at the port of destination or the port nearest thereto where warehouses could be found. In both cases it is consulting the apparent interest of the owners and at the same time securing the claim of the carrier for his freight.

We shall send the case back to be tried on these principles. The verdict was rendered under an instruction confining the jury to the mere question of a custom, about which the evidence was very slight and unsatisfactory. The steamboat masters, who were examined, spoke of a general practice of returning freight to the owners here where the consignees refused to receive it, but did not explain the character of the goods so returned and received and paid for. They may have been misled by one or two incidents falling under their observation, and supposed that a case here and there, perhaps perfectly consistent with our understanding of the law, constituted a custom universally applicable under all circumstances. We doubt the existence of a custom so

totally destructive of the interests of shippers as was imagined to be established in this case. With the concurrence of all the judges, the case is remanded.

JEFFERSONVILLE RAILROAD CO. v. COTTON.

SUPREME COURT OF INDIANA, 1868.

[29 Ind. 498.]

FRASER, J. The goods of the plaintiff, Anna M. Cotton (appellee), were delivered to the appellant, at Jeffersonville, to be shipped to her husband, F. M. Cotton, at Indianapolis. The appellant carried the goods safely to Indianapolis, where they arrived on the same day, July 28, 1866, and were kept in the appellant's station free of charge until August 4, when they were deposited by the railroad company in the warehouse of responsible and careful warehousemen at Indianapolis. The goods remained there until September 18, when, without negligence, they were destroyed by fire. Seven days before the fire, the plaintiff, with her husband, called at the defendant's office and asked for the goods, and was informed by a person in charge that they had not arrived. The warehouseman, on receipt of the goods, uniformly notified the consignee by mail, though no one remembered mailing this particular notice. The plaintiff first learned of the shipment of the goods in September, from a sister in Jeffersonville, and never received notice from any one in Indianapolis. The plaintiff had judgment for the full value of the goods, and the case is here on the evidence.

The appellant was in fault only in giving false information as to the arrival of the goods, in consequence of which the jury have inferred that the plaintiff could not find the goods, and that they were destroyed by fire, whereas, if the truth had been communicated, she would have obtained the property and saved it from destruction. The appellant should suffer whatever losses to its customers result directly from such conduct of its employee as this evidence discloses. It was easy enough to have told her the truth; the instincts of a gentleman ought, alone, to have been enough to induce this, but the case shows that it is not always so, and therefore that the responsibility of the railroad company for resultant damages is the only adequate security which the public sometimes have against the supercilious self-consequence of subordinate employees. This tends to secure clerks and agents who will deal truthfully and courteously with those who transact business with them. It is the last case in which the rule *respondent superior* should be relaxed. It was the duty, and not merely a favor, of the carrier to give such information as would enable the owner of the goods to find the warehouseman with whom they were stored. The falsehood communicated, instead of the truth, would possibly have prevented a discovery of the goods if no fire had occurred; or, at any rate, it prevented the

plaintiff from getting possession of them, and thus saving them from the subsequent conflagration. The falsehood, therefore, while it did not cause the fire, did nevertheless, perhaps, produce the loss. So the jury may have considered, and we do not feel at liberty to set aside their conclusion. It is not so plainly unreasonable as to justify our interference.

The judgment is affirmed, with costs.

HEDGES v. HUDSON RIVER RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1872.

[49 N. Y. 223.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiffs entered upon a verdict, and affirming order denying motion for new trial.

The action was brought against defendant as a common carrier, to recover the value of a portion of a car-load of paper which was burned at defendant's freight station in the city of New York. The paper was shipped to plaintiffs from Fulton, N. Y.

The car containing the paper arrived at defendant's freight station in New York at 7 A. M., May 23d. The plaintiffs received notice of its arrival at 9.40 A. M. on the 24th of May. The plaintiffs thereupon directed one Raymond, a carman who did their work, to go (after he had delivered a load he was then taking on his truck) to the defendant's station, pay the freight on the paper, and "bring down a load of it as quick as you can." Raymond started at 10.15 A. M., and was one hour and forty minutes in going to the defendant's station. He took 500 reams and drove back to the plaintiffs' store, and there unloaded by about 3 P. M. He did not return for another load, but for the remainder of the day carted to other places or remained idle.

The plaintiffs gave no further or other directions as to the paper, and made no further effort to get it or any part of it away from the defendant's station, either by Raymond or by hiring other trucks. The remainder of the paper remained in the car, and in the night of that day and the morning of the following day was burnt up with the car by a fire of incendiary origin.

The defendant gave evidence tending to show that Raymond might have taken away two loads more before 6 P. M., the hour at which defendant ceased to deliver freight.

The court charged that plaintiffs were bound to take away the paper within a reasonable time after notice, and that this was for the jury to decide.

The jury gave a verdict in favor of the plaintiffs for \$984.20, the value of the paper burned, with interest.

FOLGER, J. The defendant remained liable as common carrier of the paper until the plaintiffs had a reasonable time to remove it, after notice of its arrival at the depot in New York city. (*Fenner v. Buff. and St. Line R. R. Co.*, 44 N. Y. 505.) What is such reasonable time is, when there is no dispute as to the facts, a question of law for the court. (*Roth v. Buff. and St. L. R. R. Co.*, 34 N. Y. 548.)

We do not perceive that there is here any dispute as to the material facts. It is certain that with three or four trucks, all the paper could easily have been hauled away before the close of defendant's business on the day on which one load was taken with one truck. It is certain too, that with the one truck of their own, two loads could have been received by the plaintiffs from the defendant on that day; so that it was a question of law for the court whether it was unreasonable for the plaintiffs to employ but one truck; or if reasonable to employ but one truck, whether it was reasonable to send it but once for paper that day. The learned judge left the question to the jury. In this we think that he erred; for, though we find no error in the terms of his instructions to the jury, nor in his refusals to charge the requests made by the defendant, yet as the finding of the jury was different from what we hold that the law determines, there was error in committing it at all to the jury; which was injurious to the defendant.

The plaintiffs seek to hold the defendant to a strict liability as insurer of the goods. Asking that so rigid a rule be applied to the defendant, it is just that the plaintiffs in turn, be held to prompt and diligent action. A consignee cannot, after he has notice of the arrival for him of property, defer taking it away while he attends to his other affairs. He may not thus prolong the time during which the carrier shall remain liable as an insurer. That would be to make the carrier a mere convenience for the consignee, without consideration of any kind to the carrier, and yet resting under a great risk. So much time as the consignee after notice gives to his other business, to the neglect of taking charge of his property and removing it from the custody of the carrier, cannot be allowed to him in estimating what is a reasonable time for him in which, after notice of arrival, to take delivery of his goods. He is not to be compelled to leave all other business to take his goods from the hands of the carrier. He may attend first to whatsoever demand of his business he deems the most urgent or the most profitable; but he cannot do this at the hazard and expense of the carrier. It is the duty of the carrier to give notice of arrival; it is the duty of the consignee at once and with diligence to act upon this notice and to seek delivery, and to continue until delivery is complete. Either may neglect this his duty; but then the consequence of neglect must be borne by him.

Now the testimony here without conflict, shows that after the receipt by the plaintiffs of notice of the arrival of this paper, they continued

for a space, in attention to other business than taking it from the defendant's charge; and that after one load had been taken, they turned again to other duties. They thus let slip time enough in which to have called for and have received another load. It may be true that this load would not have reached their store before the hour at which they usually closed it; and if it was of importance to them not to vary their habit in this, they could as they did, refrain from returning to the depot for the second load. It would then have remained as it did, in the custody of the defendant, who could not have divested itself of the duty to care for it, as bailee thereof. But had the plaintiffs the right for their own convenience, to put upon the defendant the greater onus of holding it as insurers? There is no justice in compelling the defendant to be the sufferer thereby. There is no justice in it, that the time thus otherwise used by the plaintiffs should not lessen by so much the reasonable space accorded to them for removal of their effects.

We are not compelled at this time, to hold in this case that the plaintiffs were called upon to employ in the removal of the paper more than the single truck and the two servants with which they ordinarily effected the hauling of matter to and from their store. Circumstances might exist which would require more than this of a consignee.

The respondents suggested that the goods were destroyed through the neglect of the appellant. The case was not tried nor hitherto disposed of upon this theory. It would not be just at this stage of the matter, to determine it on that ground.

For the error at the trial there should be a reversal of the judgment, and a new trial ordered, with costs to abide the event of the action.

All concur, except PECKHAM, J., not voting.

Judgment reversed.

CHICAGO AND NORTHWESTERN RAILROAD CO.
v. SAWYER.

SUPREME COURT OF ILLINOIS, 1873.

[69 Ill. 285.]

MCALLISTER, J. This suit was brought by appellee against appellant to recover for 174 chests of tea, shipped by the former, in bond, from San Francisco, being part of an invoice of 354 chests, and received while in transit by appellant at Omaha, to be transported for hire on its cars from thence to Chicago, and there, under the provisions of the act of Congress and regulations of the revenue department in that behalf, delivered into a bonded warehouse.

The entire invoice arrived in Chicago, but in separate lots, on the 4th day of October, 1871. As to one lot, of 180 chests, appellant's agents gave notice to the consignee, whose place of business was

denoted by the way-bill, and, by his directions to the collector, that lot was delivered at the Burlington bonded warehouse, with which appellant's track connects, and was saved. There was where the consignee intended to have the whole invoice delivered, but appellant's agents failed to give him any notice of the arrival of the 174 chests in question, and failed likewise to give any written notice of their arrival at the collector's office; but, relying upon mere personal knowledge of their arrival by an inspector of the collector's department, these goods were permitted to remain in appellant's cars from the 4th until the 8th and 9th of October, when they were burned in the cars.

It is an established fact in the case, that, by the regulations of the collector's office, all notices of the arrival of goods shipped in bond to that port were required to be in writing, and, inasmuch as it was a policy of the office to aid commerce, and there were several bonded warehouses in Chicago, the course of business was, to leave it to the consignee to designate which warehouse he would have the goods deposited in. From this policy sprang a custom of the carrier of goods in bond to notify the consignee of their arrival; and this, the evidence tends to show, was well known to the agents of appellant. But the carrier could secure a delivery by giving a written notice directly to the collector or his deputy. The deputy collector explained, in his evidence, the reason of requiring all notices to be given to the proper officers, and in writing. It was because they were required to keep a record of all their transactions.

The carrier received these goods, to be transported for hire, knowing, at the time, that they were goods subject to duty to the government, and being shipped from one collection district to another, and that, by the law of Congress and the regulations of the revenue department, they could be delivered only into a bonded warehouse, to be reached in compliance only with certain specific regulations. When the carrier received the goods with this knowledge, it impliedly undertook that the goods should be safely delivered at the place of their destination, in the special manner required, and within a reasonable time.

The liabilities of common carriers are for all losses, even inevitable accidents, except they arise from the act of God or the public enemy. And by the act of God is meant something superhuman, or something in opposition to the act of man. In all cases, except of that description, the carriers warrant the safe delivery of the goods. *Hale v. The New Jersey Steam Navigation Co.*, 15 Conn. 539; 2 Redf. Am. R'wy Cases, 3.

In *Elliott v. Russell*, 10 Johns. R. 1, KENT, Ch. J., said: "It has long been settled that a common carrier warrants the safe delivery of goods in all but the excepted cases of the act of God and public enemies; and there is no distinction between a carrier by land and a carrier by water." And, in his Commentaries, the same learned jurist says: When the responsibility has begun, it continues until there has been a due delivery by him, or he has discharged himself of the custody

of the goods in his character of common carrier. There has been, he says, some doubt in the books as to what facts amounted to a delivery, so as to discharge a common carrier. If it be the business of the carrier to deliver goods at the house to which they are directed, he is bound to do so, and give notice to the consignee. The actual delivery to the person is generally conceded to be the duty of the carrier. 2 Kent's Com. 604. This doctrine is fully recognized by this court in *Baldwin v. Am. Ex. Co.*, 23 Ill. 197.

In *Chicago and Rock I. R. R. Co. v. Warren et al.*, 16 Ill. 505, this court held that the responsibility of the carrier does not end until that of the owner, consignee or warehouseman begins; that there must be an actual or legal constructive delivery to the owner or consignee, or to a warehouseman, for storage, in order to discharge the carrier from liability as such.

In *Porter v. The Same*, 20 Ill. 407, this court, adopting the views of the Supreme Court of Massachusetts, delivered by Chief Justice SHAW, in *Norway Plains Co. v. The Boston and Maine R. R. Co.*, 1 Gray, 263, held, as to the ordinary business of railroads as common carriers, that they are responsible as common carriers until the goods are removed from the cars and placed upon the platform; and if, on account of their arrival in the night, or at any other time when, by the usage or course of business, the doors of the merchandise depot or warehouse are closed, or if, from any reason, the consignee is not there to receive them, it is the duty of the company to store them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when called for by the parties entitled to receive them. And for the performance of these duties, after the goods are delivered from the cars, the company is liable as warehouseman or keepers of goods for hire; that notice to the consignee was not necessary to exonerate the railroad from its liability as common carrier.

In adopting these views, the learned judge who prepared the opinion of the court cites the case of *Moses v. The Boston and Maine R. R. Co.*, 32 N. H. Rep. 523, as supporting the same doctrine. This was a clear misapprehension, for the court, in the last mentioned case, at the close of a very able opinion presenting the opposite view, refer to the case in Gray, and say: "The ground upon which the decision is based, would seem to be the propriety of establishing a rule of duty for this class of carriers, of a plain, precise and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such a character, is not to be doubted; but, with all our respect for the eminent judge by whom the opinion was delivered, and for the learned court whose judgment he pronounced, we cannot but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes." The rule was expressly repudiated by the Supreme Court of Vermont, in

Blumenthal v. Brainard, 38 Vermt. R. 402, and by Chief Justice Redfield in his work on the Law of Railways, sec. 130, pl. 6, note 9 and pl. 9. It was, however, reaffirmed by this court in *Chicago and Alton R. R. Co. v. Scott*, 42 Ill. 132, but not without some suggestions against it by Justice Breese, who delivered the opinion of the court. Since that, it has been fully recognized, and has become the settled law of the court. *Merchants' Despatch Co. v. Hallock*, 64 Ill. 284.

But in *Porter's* case, above cited, while the court held that removing the goods from the car on their arrival at the place of destination, and, if not called for, they are placed in a suitable warehouse, amounted to a delivery, which terminated the liability of the carrier as such, the court held that conveying the goods to the terminus of the road, or at their destination upon the route of the road, without a delivery of them from the cars, could not amount to such a delivery. The court said: "The goods are still as completely under the control of the carrier as before, and the owner or consignee would be as effectually precluded from exercising any control over them. He could do no act for their security or protection while locked up in the car, and none but the carrier and his agents and servants could even know they had arrived. We are strongly inclined to the belief that no decision can be found that such an act releases them from their liability of carriers, and that it should not without something further on their part."

When we go back to the *Norway Plains Company* case, 1st of Gray, it is seen that Chief Justice Shaw formulated the rule in this wise: "The court are of opinion that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith, or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for."

It is very apparent that no such implied contract could arise under the circumstances of the case in hand, nor is one implied that actual delivery would be made to the consignee in person, because these goods were received with the knowledge that they were being shipped in bond, under the provisions of an act of Congress and the regulations of the treasury department in that behalf, and that, therefore, they could not be delivered upon the platform of the railroad, or otherwise, to either the consignee or owner or any general warehouseman, but were required to be delivered into a bonded warehouse, under the superintendence of the collector or some authorized officer in his department. Such a delivery was necessarily subject to the regulations of the law and the revenue department of government.

The contract on the part of the carrier implied by these circum-

stances was, therefore, to safely carry the goods to the place of their destination, and there safely deliver them into a bonded warehouse or into the custody of the collector of the district there, in compliance with the regulations and course of business of the collector's office in that behalf. This the appellant did not do. There was no delivery of these goods out of the custody of the carrier, under any rule known to the law. Failing to give notice to the consignee, appellant's duty required it to give the written notice at the collector's office required by its regulations and course of business. Failing in this also, and retaining the goods in the cars until they were destroyed by the fire, which was not a loss arising from the act of God or the public enemy, appellant was liable as common carrier.

The judgment of the court below must be affirmed.

Judgment affirmed.

HARDMAN v. MONTANA UNION RAILWAY CO.

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, 1897.

[83 Fed. 88.]

Ross, Circ. J. This was an action to recover the value of certain goods shipped by the plaintiff from the city of Anaconda to the city of Butte, in the State of Montana, which the defendant railway company, a common carrier between the points named, undertook to and did carry for a consideration paid, and which goods were thereafter damaged by fire while in the warehouse of the defendant company in the city of Butte. The case was tried before the court below without a jury, pursuant to a stipulation of the parties. The facts found by the court are not, therefore, open to review here. *Farwell v. Sturges*, 6 C. C. A. 118, 56 Fed. 782; *Skinner v. Franklin Co.*, 6 C. C. A. 120, 56 Fed. 783; *Wile v. Bank*, 17 C. C. A. 25, 70 Fed. 138. From the findings of the court, these among other facts appear: On or about June 21, 1895, the plaintiff delivered to the defendant at the city of Anaconda, to be transported by the defendant, and delivered to the plaintiff at the city of Butte, Mont., the goods in question, paying the defendant for such transportation the sum of \$11.09, in consideration of which payment the defendant agreed to deliver the goods to the plaintiff in the city of Butte. The defendant transported the goods to the city of Butte in accordance with its undertaking, and there unloaded the same from its cars, and stored the goods in its warehouse in that city, in which they remained from June 21 until the night of July 2, 1895, at which time the warehouse caught fire, inflicting the damage which gave rise to the action. The findings further show that the defendant did not itself have sufficient fire appliances to extinguish or control the fire, but that its warehouse was situated within the city

of Butte, which city possessed a fire department with sufficient water facilities; that upon the discovery of the fire one of the police officers of the city turned in a fire alarm, to which the fire department immediately responded; that upon the arrival of the department at the scene of the fire it was notified by one of the police officers of the city that a car-load of powder was standing immediately adjoining the platform on the south side of the warehouse, and that thereupon the fire department withdrew, upon the order of the chief of the department, until he could make an investigation; that the car was sealed by the employees of the defendant company, and was labelled "Powder," but that by whom it was so labelled did not appear from the evidence; that it was subsequently discovered by the chief of the fire department of the city that the car did not in fact contain any powder, upon the discovery of which fact the fire department was ordered by him to immediately return to the fire and attempt to extinguish it; that a period of about 10 or 12 minutes elapsed between the departure of the fire department from the scene of the fire and its return thereto. The thirteenth finding of fact is in these words.:

"That if the said fire department had not believed that a car-load of powder was standing on the track adjoining the said warehouse, and had begun to work at the said fire upon their first arrival, the same could have been extinguished without any loss."

The conclusions of law drawn by the court below, in respect to which errors are assigned, are as follows:

"First. That it was not the duty of the defendant to furnish or keep any fire apparatus in the vicinity of the said warehouse, to extinguish fires in or about the same. Second. That the defendant is not liable to the plaintiff for the loss of the said goods so stored in the warehouse as aforesaid, defendant's liability being that of a warehouseman; and it was not guilty of any negligence in connection with said fire, or in extinguishing the same."

The plaintiff in error assigns for error the second conclusion of law above given —

"For the reason that the testimony of the defendant's own witness, McGrade, and all of the evidence, shows that the defendant, by its servants and employees, loaded a car labelled 'Powder,' and negligently allowed and permitted the same to stand upon the track near and adjoining the said warehouse, at a point at or near where the fire occurred therein, and thereby prevented the fire department of the city of Butte from extinguishing or attempting to extinguish the said fire in its incipency, and that the said act of the said defendant and its servants and employees in negligently allowing the said powder-labelled car to be and remain in said position was the direct cause of the plaintiff's loss, and that, if it had not been for defendant's negligence in allowing the said car to be in the said position, labelled 'Powder,' the said fire could have been extinguished without any loss or damage to plaintiff."

If the car labelled "Powder" had in fact contained that dangerous combustible, the right of the plaintiff to recover could not admit of doubt, in view of the finding of the court to the effect that but for its presence the fire would have been extinguished without loss. A railroad company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded, in the absence of a statute declaring otherwise, as a bailee for hire, and not as a naked depository. *Whart. Neg.* § 478; *Norway Plains Co. v. Boston & M. R. R.*, 1 Gray, 273; *White v. Railroad Co.*, 3 McCrary, 559, Fed. Cas. No. 17,543. The actual storage of powder in such close proximity to the property so held as to prevent, through reasonable fear, firemen from extinguishing the fire that does the damage complained of, would be such negligence as would render the company liable. *White v. Railroad Co.*, *supra*, and authorities there cited; *Myers*, Fed. Dec. § 612. Although, as a matter of fact, there was in the present case no powder in the car, yet it was labelled "Powder," which fact indicated to every ordinarily prudent person that it contained that article. The fire company acted, as it had the right to do, upon appearances. While it is not shown that the defendant actually put the powder label on the car, it had the control of the car, and permitted it to remain so labelled on its track by the side of its warehouse, and thus represented to every one that it did contain powder. The finding of the court below is to the effect that but for the label upon the car the fire that caused the damage sued for would have been extinguished without loss. Under these circumstances, we are of opinion that the plaintiff was entitled to recover. Judgment reversed, and cause remanded for a new trial.

ORMOND *v.* HAYES.

SUPREME COURT OF TEXAS, 1883.

[60 *Tex.* 180.]

MARY ORMOND, for the benefit of herself and minor son, brought this suit against the I. & G. N. Railroad Company and its receiver, R. S. Hayes, for \$30,000 damages, claimed for the wilful and negligent killing of James Ormond, her husband, by the appellees and their servants at Jacksonville, Texas, December 26, 1878. Ormond, his wife and child were to stop at the section-house, one-quarter of a mile distant from Jacksonville station; the train (which was a freight), however, did not stop until it reached that station. There Ormond and his family alighted, and while he was engaged in seeing after their baggage, consisting of household furniture, etc., the engine, under the control of its fireman, while being used for switching purposes, struck its tender against Ormond, crushing and killing him.¹

¹ The pleadings, facts of the trial, and arguments of counsel are omitted. — ED. •

WEST, ASSOCIATE JUSTICE. — We have examined the record in this case with more than usual care. While the charge of the court, in the main, presents the issues between the parties very clearly and fairly, yet in some respects it was liable to objection, and its language may possibly have unduly influenced the jury in passing upon the facts in evidence before them.

In the pleadings the plaintiff in error alleged and introduced some evidence in support of the averment that the defendant in error agreed to stop its train at its section-house, one-fourth of a mile west from Jacksonville, and that when that point was reached, it refused or declined to stop its train there, but on the contrary carried the deceased and the plaintiff a short distance further, to the town of Jacksonville, before stopping its train. On this subject the court charged the jury as follows: "Under the allegations and proof it is immaterial to the plaintiff's right to recover, whether the train was stopped at the section-house or not, and in making up your verdict you will not consider that question."

We think, under the state of the pleadings and evidence in this case, that this was perhaps stating the matter somewhat too strongly against the plaintiff in error and her infant child. It seems, also, to be perhaps to some extent a charge upon the weight of evidence, or at least was calculated to create that impression on the minds of the jury. It was not proper, under the evidence, to wholly withdraw the consideration of that matter from the jury.

We think, also, under the facts of this case, that the court laid down the law in rather too strong and unqualified terms, when it informed the jury that as soon as the deceased "alighted in safety from the car or caboose in which he and his wife (the plaintiff) were carried, then the relation of passenger ceased, and from that time the defendants owed them no duty as passengers," etc., etc., and more to the same effect. The evidence showed that the deceased was received as a passenger on the defendants' train, and that his wife, infant child and nurse, who were under his charge, were also so received as passengers. The proof also discloses the fact that the defendants' servants, without objection, received from him, at the same time, as baggage to be by them transported, a considerable number of bulky articles of furniture, bedding and clothing, which they agreed and bound themselves to deliver to him at his point of destination. It does not appear that for this considerable amount of baggage, consisting of a number of articles, that the defendants gave him any check, receipt or any kind of evidence or token of their possession of it. Under all the circumstances disclosed in evidence, when we consider the nature and quantity of the baggage and the absence of any baggage checks or receipt to the deceased, we think he, as such passenger, had a right to go to the baggage car for the purpose of identifying and claiming his property and receiving it from the employees of defendants, and if he did no more than simply aid and assist the defend-

ant's employees in identifying and removing his own baggage from the car to the platform, that the court stated the law too strongly against plaintiff when it informed the jury that these acts of his, in relation to his own baggage, constituted him a fellow-servant with the employees of defendants. We think, under the special facts of this case, as disclosed in the record, that the relation of carrier and passenger had not entirely ceased, for all purposes, to exist, and that the deceased had the right, under the facts of this case, to look after his baggage, and that by so doing, and by aiding the servants of defendants in selecting and removing it from the car, he did not lose all the rights of a passenger and thereby become a servant and an employee of defendants. The charge of the court, as framed, did not present this issue as fairly and fully to the consideration of the jury as should have been done.

Under all the circumstances we are of the opinion that the judgment should be reversed and the cause remanded for a new trial. It is therefore so ordered.

Reversed and remanded.

KEEFE v. BOSTON AND ALBANY RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1886.

[142 Mass. 251.]

FIELD, J. The principal contention of the counsel for the defendant is, that, "as soon as the plaintiff began her progress towards the west, for the purpose of crossing the railroad at a place not intended nor prepared for such use, she ceased to have any right to protection as a passenger, because the safe and proper way of egress for passengers was in the opposite direction."

There was evidence that the construction of the platform on the south side of the railroad, and the use made of it, were such that it was intended by the railroad company to be used by passengers, so far as was necessary or convenient for them in entering or leaving trains. The defendant's engineer testified that the "platform was designed for the accommodation of all the public who land at the station." The plaintiff cannot be considered as a trespasser, or a mere licensee, if, immediately on leaving the train, she chose to walk over the platform in the direction she was walking for the purpose of leaving the platform to go home, if the place where she was walking was fitted up and intended for the use of passengers. If the defendant was under no obligation to furnish such a platform, yet if it did furnish it, and arranged it in such a manner as to invite passengers to walk over it as they found it convenient while waiting for trains, or for conveyances to take them from the station, or while preparing to leave the station, it must exercise due care towards passengers found upon it. That the plaintiff intended in her mind, after she left the platform,

to cross the railroad at a place where she had no right to cross it, is not conclusive against her right of action. She was not necessarily a trespasser, or mere licensee, when and where she was struck, because she intended afterwards to become either one or the other.

The well-known usages of railroad companies and of the public make it impossible to hold, as matter of law, that it was the duty of the plaintiff, immediately on leaving the cars at the station, to take the shortest practicable course to the nearest highway, and that, if she did not, she became a trespasser or licensee only. The defendant was bound to keep in safe condition for its passengers all that part of its stations and platforms where passengers were expressly or impliedly invited to go: and was bound, by its servants and agents, to exercise due care towards passengers using its station and platforms by its invitation. The point where the plaintiff intended to cross the railroad is supposed to be the same as that mentioned in *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225; but whether the plaintiff, in crossing, would have been a licensee or a trespasser, we think, is immaterial. The intention in her mind of crossing the railroad at a point where she had no right to cross had not become an act, and she might never have acted in accordance with that intention. She was still a passenger leaving the station of the railroad, and may have been walking upon a part of the platform intended for the use of passengers.

Whether the plaintiff backed against the truck, or was struck by it, whether she or the baggage-master of the defendant, who was pulling the truck, was, under the circumstances, in the exercise of due care, and whether the platform was properly lighted, were questions for the jury.

Exceptions sustained.

DODGE v. BOSTON AND BANGOR STEAMSHIP CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1889.

[148 Mass. 207.]

KNOWLTON, J. This case presents an important question as to the rights and duties of passengers and common carriers in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has

reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger at the end of his journey has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and been put in a freight-house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time; and this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments. *Peniston v. Chicago, St. Louis, & New Orleans Railroad*, 34 La. An. 777; *Jeffersonville, Madison, & Indianapolis Railroad v. Riley*, 39 Ind. 568. So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself

by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties.

In the case of *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, a plaintiff before reaching his destination was going ashore for his own convenience at a place where the boat stopped two hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. See also *Clussman v. Long Island Railroad*, 9 Hun, 618, affirmed in 73 N. Y. 606; *Hrebrik v. Carr*, 29 Fed. Rep. 298; *Dice v. Willamette Transportation & Locks Co.*, 8 Oregon, 60. In the first of these cases, the defendant was held liable, for a defect in a platform of its station, to a passenger who had left a train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury, or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco, and fell from an unsafe plank and was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover.

No decision has been cited that conflicts with our views. In *State v. Grand Trunk Railway*, 58 Maine, 176, the circumstances under which the passenger left the train and remained away from it were such that, applying the principles we have enunciated, he was not a passenger at the time he was killed. The court in that case was not called upon to consider at what point a passenger leaving a car under different circumstances would cease to be such, and at what point he would resume his former relation.

Upon the undisputed facts of the case at bar, we are of opinion that the plaintiff as a passenger could properly go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that, if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip, as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers of passengers, as distinguished from the ordinary care required of men in their common relations to each other. Because a passenger's life and safety are necessarily intrusted in a great degree to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which

human care and foresight can guard against. This rule is held not only in our own State and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage-coaches, steamboats, and sailing vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger.

In *Readhead v. Midland Railway*, L. R. 2 Q. B. 412, it is said that a "carrier of passengers for hire was bound to use the utmost care, skill, and diligence, in everything that concerned the safety of passengers." In *Railroad Co. v. Aspell*, 23 Penn. St. 147, carriers of passengers are said to be responsible for "any species of negligence, however slight, which they or their agents may be guilty of." In *Warren v. Fitchburg Railroad*, 8 Allen, 227, the principle was applied to providing for a passenger a safe and convenient way and manner of access to the train. In *Simmons v. New Bedford, Vineyard, & Nantucket Steamboat Co.*, 97 Mass. 361, it was applied to the duty of a carrier to protect passengers from the misconduct or negligence of other passengers.

Gaynor v. Old Colony & Newport Railway, 100 Mass. 208, was a case where it appeared that the defendant did not provide proper safeguards against injury for a passenger leaving the place where he alighted from the cars. Mr. Justice Colt said, in the opinion: "The plaintiff was a passenger, and while that relation existed the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection, so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction and arrangement of their station buildings, platforms and means of egress, as in their previous transportation." See also language of Chief Justice Shaw, in *McElroy v. Nashua & Lowell Railroad*, 4 Cush. 400.

Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest;

that is, in reference to each particular it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars. *Warren v. Fitchburg Railroad*, 8 Allen, 227; *Le Barron v. East Boston Ferry*, 11 Allen, 312, 315; *Taylor v. Grand Trunk Railway*, 48 N. H. 304, 316; *Tuller v. Talbot*, 23 Ill. 357.

It may be assumed that the plaintiff would have ceased for the time to be a passenger if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused. For, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank or the slip. It was the same in either place. But in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances. The decision in *Moreland v. Boston & Providence Railroad*, 141 Mass. 31, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed, that the defendant had provided a safe and convenient place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use by passengers. The judge said in his charge, "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck, nor do I understand that the plaintiff now claims that the defendant intended the gangway which was in fact used by the plaintiff for use by passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case, and, upon these facts, a warning to the plaintiff not to leave the steamer from the gangway by which he went was a reasonable order or regulation. A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety when acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it.

This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law. *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146; *Pennsylvania Railroad v. Zebe*, 33 Penn. St. 318; *McDonald v. Chicago & Northwestern Railroad*, 26 Iowa, 124, 142; *Gleason v. Goodrich Transportation Co.*, 32 Wis. 85. We are of opinion that the jury should have been instructed in accordance with it. It was

not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case, which involved a consideration of all the evidence relative to that phase of it. And if by the word "notified," in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request. No instructions were given upon this subject, and because of this error the entry must be

Exceptions sustained.

CREAMER v. WEST END STREET RAILWAY CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1892.

[156 Mass. 320.]

BARKER, J.¹ The plaintiff's intestate was instantly killed on Warren Street by an electric car, which, it was testified, was running at a speed of fifteen miles an hour. His death under such circumstances gave the plaintiff a right to maintain the action under the St. of 1886, c. 140, if, when killed, he was a passenger, or if, not being a passenger, he was in the exercise of due diligence. He had ridden as a passenger upon another car, which he had left immediately before he was killed. When struck, he was walking across Warren Street, having taken one or two steps from the place where he had touched the ground on leaving his car, and was between the rails of the track on which was the car by which he was struck. He had not reached or had time to reach the sidewalk of Warren Street, but he had left the car on which he had been a passenger, and had begun his progress on foot across the street. We are of opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveller upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station. *Warren v. Fitchburg Railroad*, 8 Allen, 227. *McKimble v. Boston & Maine Railroad*, 139 Mass. 542. *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207, 214. But one who steps from a street railway car to the street is not upon the

¹ Part of the opinion only is given. — ED.

premises of the railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveller upon the highway, and not of a passenger.

BUCKLEY v. OLD COLONY RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1894.

[161 Mass. 26.]

BARKER, J. The plaintiff's intestate was killed by an express train which struck him as he was crossing the defendant's tracks in the rear of another train. There is no contention that, unless he was a passenger at the time, he was himself in the exercise of due care, but if he was a passenger it is not necessary to show that he was in the exercise of due diligence in order to recover under Pub. Sts. c. 112, § 212. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211.

We are of opinion that the deceased had ceased to be a passenger before he was struck by the express train, and that the verdict for the defendant was rightly ordered. The deceased had purchased his ticket for the Easton station, and had ridden in the train as a passenger until the train had nearly reached that station. The train had then been stopped a short distance from the station to await the passing of an express train approaching from the other direction. The name of the station had not been called, nor any express or implied invitation given to passengers to leave the train where it then stood; but the stop was one which the deceased must have known was for some purpose other than the discharge of passengers. It is not contended that he left the train for any purpose except to pursue his homeward route on foot, and he had less distance to travel on foot, if he left the train where it stopped, than if he rode to the station.

No witness was called who saw him on the train, but it was admitted that he bought a ticket for Easton and took the train and rode in it until near that station. Upon this state of the case there was no possible conclusion except that he knowingly and voluntarily left the train, at a place not designed for the discharge of passengers, for the sole purpose of continuing his homeward journey on foot. When he so left his car he thereby terminated his relation to the defendant as a passenger, and it was under no obligation to him to afford him a safe path on his further progress. See *Frost v. Grand Trunk Railroad*, 10 Allen, 387. As held in *Commonwealth v. Boston & Maine Railroad*, 129 Mass. 500, "If he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to

be under any obligation to provide him with the means of travelling further." The deceased was not injured in leaving the train, but in pursuing his own course on foot at a point distant from the place where he alighted, so that there is no occasion to consider the question raised in *McKimble v. Boston & Maine Railroad*, 139 Mass 542, whether the defendant ought to have prevented him from leaving the train or have warned him not to do so. It gave him no invitation to alight, and is not responsible for his voluntary act. The case so differs in its facts from that of *Boss v. Providence & Worcester Railroad*, 15 R. I. 149, on which the plaintiff relies, that there is no occasion to discuss that decision. There the plaintiff testified that he supposed the train had arrived at his station, and he was hurt while leaving it in the manner usual at that station.

Judgment on the verdict.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
CO. v. WOOD.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1900.

[104 *Fed.* 663.]

CALDWELL, Circ. J. Nancy A. Wood, the plaintiff below and defendant in error, was a passenger on one of the regular passenger trains on the Chicago, Rock Island & Pacific Railway Company, the defendant below and plaintiff in error, from Kansas City to Whitewater, a regular station on the defendant's road. The train bearing Mrs. Wood arrived at Whitewater Station about 4 o'clock on a foggy, misty morning, while it was very dark. By the aid of the light afforded by the train she got off of the car and entered the station. There was no station agent at the station, and no light in the station or on the platform or elsewhere, and when the train pulled out she was left in utter darkness. The platform of the station was three feet above the ground, and extended around the building, and had no railing. Immediately after entering the station, Mrs. Wood had occasion to seek a water-closet, and while proceeding cautiously in the dark to find one, and without any negligence on her part, she fell from the platform to the ground, and sustained the injuries complained of. We do not understand that it is controverted that it was the duty of the railway company to have an agent at its station, and to have its station and platform lighted, and to provide a water-closet accessible to its passengers without risk or danger. The defense in the case is this: Mrs. Wood testified that at or before the time the train arrived at the station she had made up her mind not to leave the station, and go forth in the darkness to find the residence of the friend she had come to visit; and the contention of the railway company is that this mental resolution to remain in the station until daylight terminated the relation of carrier and passenger at once,

and that she cannot recover for an injury resulting from the negligence of the railway company, although it occurred immediately after she entered the station, and before she had had a reasonable time to leave it. The refusal of the circuit court to take this view of the law is assigned for error.

Assuming, but not deciding, that Mrs. Wood would have had no right to remain in the station in the character of a passenger until daylight, she did have the right to remain there and enjoy all the privileges and protection due to a passenger for a reasonable time, under all the circumstances, after alighting from the car. Confessedly that time had not elapsed when she received her injury, and it is wholly immaterial to inquire, therefore, whether it might not have elapsed at some later time after she had received her injury. She has a right to stand on her undoubted legal rights as they stood at the time she received her injury. She is not to be deprived of these rights upon a suggestion that she might have remained at the station long enough to dissolve the relation of carrier and passenger. It is enough to say that that relation had not terminated when she received her injury. A formal resolution to remain in a station for an unreasonable length of time after leaving the car does not excuse the company from performing its duty to a passenger during the time the relation of carrier and passenger continues, or, in other words, until the passenger has had a reasonable time, under all circumstances, to leave the station. That time the plaintiff had not had when she received her injury. It not being necessary to the decision of the case, we express no opinion on the question whether, upon the facts of this case, Mrs. Wood would not have enjoyed the rights of a passenger in the station if she had remained there until daylight.

The judgment of the circuit court is affirmed.

COLORADO SPRINGS AND CRIPPLE CREEK DISTRICT RAILWAY CO. *v.* PETIT.

SUPREME COURT OF COLORADO, 1906.

[37 *Colo.* 326.]

GUNTER, J.¹ The evidence, sufficient for the jury, tended to show the following facts: Defendant was operating an electric railway between Cripple Creek and Victor, this state; plaintiff was a passenger for hire thereon; defendant had been repairing a section of this road between said points, and, temporarily, this section, to the extent of about 250 feet, was not in use; when the car in which plaintiff was riding reached, on its way to Cripple Creek, this section of the road, the passengers were instructed to change cars; this was done by walk-

¹ Part of the opinion only is given. — Ed.

ing over the section under repair and taking another car; plaintiff, in making the change, left his car, and started along the railway toward the Cripple Creek car; the hour was dark, and the way dimly lighted; plaintiff walked the ties for some distance, but the travelling there being unsafe because of the absence of ballast and the ties being elevated above the ground, he abandoned the ties, and took the ground immediately outside the rail; when about 100 feet from the Cripple Creek car, he stepped into an open hole made for a trolley pole, and sustained serious injuries at the knee joint; as stated, he had a verdict and judgment for damages so sustained.

1. It is said there was an absence of proof that defendant was negligent in this: There was no evidence that defendant dug the hole into which plaintiff stepped, or that the hole had existed a sufficient time to charge defendant with notice of its presence.

There was evidence that the defendant's railway was electric; there was evidence that the hole was close to defendant's track, and dug for a trolley pole.

We think such evidence, in the absence of explanation, justified the conclusion that defendant dug the hole.

Further, the accident was about 2 o'clock in the morning. The hole must have been dug not later than the preceding day, and was uncovered when the accident occurred.

Defendant knew that the way would be travelled by its passengers in the darkness of the following night. It was guilty of negligence in not using reasonable care to see that the way was reasonably safe before the night came on. If it had exercised such care, it would have discovered the presence of the hole, and would have rendered it safe. Defendant, therefore, was charged with notice of the defective condition of the way.

Further, the relation of carrier and passenger existed between plaintiff and defendant when he was passing from one car to the other, and it was the duty of defendant to use reasonable care to have the way over which plaintiff was to pass in a reasonably safe condition. — Chicago & A. R. R. Co. v. Winters, 175 Ill. 293; St. Louis S. W. R. Co. v. Griffith, 12 Tex. Civ. App. 631; Baltimore & Ohio R. R. Co. v. The State, 60 Md. 449, 463.

As the relation of carrier and passenger existed while the plaintiff was passing over this way, and as the way was in an unsafe condition, and from such condition the accident resulted, a *prima facie* case of negligence was made out against defendant, and the burden was then upon it to show the absence of negligence in the unsafe condition of the way. — Denver Cons. Tramway Co. v. Rush, 19 Colo. App. 70, and authorities there cited.

There was no evidence to overcome this *prima facie* case.¹

¹ See Keator v. Traction Co., 191 Pa. 102. — Ed.

GREEN v. BALTIMORE AND OHIO RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA, 1906.

[214 Pa. 240.]

FELL, J. Buelah M. Green, one of the plaintiffs, was injured by falling in the defendant's station. She and her husband had been passengers on the defendant's train and arrived in Philadelphia at midnight. They walked from the train-shed to the waiting room of the station and then proceeded along the central passageway in the direction indicated by a sign board towards steps which led to the street. The station was large and well lighted. The passageway was thirty-five feet in length and eight or ten feet in width, and on either side of it there was a row of seats facing inward. It does not appear that there were any passengers ahead of the plaintiffs, and they had a clear view of the passageway and of the steps. After walking ten or twelve feet in the station Mrs. Green, who was carrying a child in her arms, fell over a large cuspidor which she had not seen. She testified that she was walking three feet away from the row of seats, and struck something and fell over it. Her husband testified that after he had helped her up, he saw the cuspidor. A station master was standing some distance from them and two porters were in the room, one engaged in cleaning the steps with a brush and the other looking out of the door.

At the trial the defendant offered no evidence and asked for binding instructions in its favor, which were refused. The questions of the defendant's negligence and of the plaintiff's contributory negligence were submitted to the jury, whose finding was against the defendant. The court reserved the question whether there was any evidence in the case that entitled the plaintiffs to recover, and entered judgment for the defendant *non obstante veredicto*, for the reason that the undisputed facts established did not warrant the inference that the defendant's employees either placed the cuspidor in the passageway or knew, or by proper inspection might have known, that it was there. The reason is thus more fully stated in the opinion filed by the learned trial judge: "Neither of the plaintiffs, nor any of their witnesses, saw the cuspidor in the aisle until after the accident; so how can we justifiably draw the inference that the company's employees must have, should have, or could have, seen it in time to have prevented the accident? For the jury to say that the defendant should have known that the cuspidor was in the place where it was found after the accident, without any other facts to justify this other than the fact that it was so found, would be to allow a mere arbitrary finding without facts on which to base it, unless we are prepared to rule as a matter of law that it is the duty of the railroad company to so police its station that it will always and at all times and under all circumstances see that its aisles are properly

clear of all obstructions that might possibly cause accidents, and this would be practically to hold railroad companies to be insurers of the safety of passengers, which under the authorities we cannot do."

At the time of her injury Mrs. Green was not a passenger. She had left the train, passed from the train-shed to the passenger station and had selected one of several passageways leading to the street. The relation of passenger and carrier had ended, and the burden of affirmative proof of negligence was upon her: *Railroad Co. v. Napheys*, 90 Pa. 135; *Hayman v. Railroad Co.*, 118 Pa. 508; *Bernhardt v. Railroad Co.*, 159 Pa. 360. The only proof was that a cuspidor, similar to those in general use in public places, was standing in a passageway three feet from a row of seats. By whom it had been placed there or how long it had been there were not shown, nor was any fact shown by which knowledge of its position could be imputed to an employee of the defendant. The plaintiff's case rested solely upon constructive notice. But the full measure of the defendant's duty was reasonable care by inspection and policing to keep its station in a safe condition. To hold that the mere proof of an injury caused by the misplacement of a loose piece of furniture in the waiting room of a station gives rise to a presumption of negligence that shifts the burden of proof would be an unwarrantable extension of the rule applicable only to a passenger seated in a railroad car who is injured through the means of transportation.

The judgment is affirmed.

HAYES v. TURNER.

SUPREME COURT OF IOWA, 1867.

[23 Ia. 214.]

THE petition claims \$160 of defendant as innkeeper, for the loss of a trunk and contents. From the testimony the court found the following facts:

1. Defendant was an innkeeper in the city of Council Bluffs, in the latter part of August, 1866.

2. At that time plaintiff stopped at said inn as a guest, having with him his trunk and the contents substantially as claimed in the petition.

3. After remaining as a guest aforesaid, from six to ten days, plaintiff, looking as he was for a location in which to set up his trade, paid his bill, except twenty-five cents, and departed for Magnolia, in Harrison county, leaving his trunk, and stating to the landlord that he would return to his inn in three or four days.

4. During his absence defendant delivered his trunk to a third person, without right, and the same was entirely lost to plaintiff.

5. After an absence of from four to seven days, plaintiff returned and stopped at said inn.

And the court found as conclusions of law :

1. The petition charges defendant in the capacity of an innkeeper alone and not as bailee.

2. That when plaintiff left for Magnolia, the relation of landlord and guest was terminated, and defendant's liability as an innkeeper for the baggage left behind was at an end.

After these facts were thus found, and the conclusions of law stated, and as the court was about to pronounce judgment, and order the same to be entered of record, plaintiff asked leave to amend his petition, by adding a count charging the defendant as bailee. This was refused, and thereupon plaintiff asked leave to dismiss his case, and take a nonsuit, which was also refused. Judgment for defendant; plaintiff duly excepted and appeals.

WRIGHT, J.¹ . . . Did the facts found justify the judgment? And here the question is, had the relation of guest and innkeeper terminated, or rather did it exist at the time of the loss? Upon principle and authority we believe the decision was right. The property lost was goods — dead goods — and the same rule does not obtain as if it had been a horse or the like. For, in the latter case, the host would have had “benefit by the continuance of the horse with him.” In the former, he would have “no benefit, and therefore the host should not be charged with loss in the absence of the guest.” 5 Bacon's Ab. 234, 235.

Nor would the rule be the same if the guest leaves, intending to, and actually should, return the same day; or, if it appeared, that though absent, he was liable all the while for his board. The case is put upon its own facts. With other cases we have nothing to do at present. The following authorities may be consulted as sustaining the judgment of the court below. *Gelley v. Clark*, Cro. Jac. 188; 2 Parsons on Con. 153, 154; *Grimmell v. Cook*, 3 Hill, 485; *York v. Greenough*, 2 Lord Raym. 866; 5 Barb. 560; 6 Har. & J. 47; 26 Vt. 316; S. C. 28 Id. 387; *Ingallsbee v. Wood*, 33 N. Y. 577; *Thickstun v. Howard*, 8 Blackf. 535; *Dawson v. Chamney*, 5 A. & E. 164; 2 Kent Com. 593; *Lane v. Cotton*, 12 Mod. 483. *Affirmed.*

¹ Part of the opinion is omitted. — ED.

CHAPTER VII.

CONNECTING SERVICES.

MUSCHAMP v. LANCASTER AND PRESTON JUNCTION
RAILWAY CO.

EXCHEQUER, 1841.

[8 M. & W. 421.]

AT the trial before ROLFE, B., at the last assizes at Liverpool, the following facts appeared in evidence:—The defendants are the proprietors of the Lancaster and Preston Junction Railway, and carry on business on their line between Lancaster and Preston, as common carriers. At Preston the line joins the North Union Railway, which afterwards unites with the Liverpool and Manchester Railway at Parkside, and that with the Grand Junction Railway. The plaintiff, a stonemason living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother accordingly took the box to the railway station at Lancaster, directed to the plaintiff, “to be left at the Wheatsheaf, Bartlow, near Bakewell, Derbyshire” (a place about eight miles wide of the Birmingham and Derby Junction Railway), and requested the clerk at the station to book it. In answer to her inquiries, he told her that the box would go in two or three days; and on her asking whether it would go sooner if the carriage were paid in advance, he inquired whether any one was going with it; on her answering in the negative, and that the person for whom it was intended would be ready at the other end to receive it, he said the carriage had better be paid for by that person on the receipt of it. It appeared that the box arrived safely at Preston, but was lost after it was dispatched from thence by the North Union Railway. Upon these facts, the learned Judge stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed: and that the same rule applied, although that place were beyond the limits within which he in general professed to

carry on his trade of a carrier. The jury found a verdict for the plaintiff, damages £16, 1s.¹

LORD ABINGER, C. B. — The simple question in this case is, whether the learned Judge misdirected the jury, in telling them that, if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel, that the defendants contract to do something more with the parcel than merely to carry it to Preston; they say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carriers a general power, along the whole line of route, to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now, it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion, that the persons who were to carry the goods from Preston to their final destination, were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not then a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of

¹ The pleadings, arguments of counsel, and concurring opinions of GURNEY and ROLFE, BB., are omitted. — Ed.

the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against *them*. But the question is, why should the jury infer one of these contracts rather than the other? which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum, rather supports the inference, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage-money; a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine what the contract was on the evidence before them. With respect to the case referred to, of the booking-office in London, it only goes to show that when persons take charge of parcels at such an office, they merely make themselves agents to book for the stage-coaches. You go to the office and book a parcel the effect of this is to make the booker your agent, instead of going to the coach-office yourself; and so that he sends the parcel to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the *carriage* of the goods. In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, *prima facie*, must be made, of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; it is only *prima facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward.

VAN SANTVOORD *v.* ST. JOHN.

COURT OF ERRORS, NEW YORK, 1845.

[6 *Hill*, 157.]

WALWORTH, Ch.¹ The plaintiffs in error were the owners of the Swiftsure line of tow-boats between New York and Albany, and were common carriers between those two places. By the usual course of the trade and business, when goods are received on board of the tow-boats at New York directed to places on the route of the canals north or west of Albany, the goods, upon their arrival at Albany, are forwarded from there by some of the regular lines of canal boats to their place of destination. Such was the testimony of Hubbel in this case; and I think it was competent to show the general commercial usage. A box of clothing marked "J. Petrie, Little Falls, Herkimer county," was sent by the porter of the defendants in error, to one of the boats of the Swiftsure line, and was delivered to the master of the boat, without any special directions as to what was to be done with it. The master of the boat gave a receipt therefor in the following words: "Received from St. John & Tousey, on board of tow-boat Ontario, one box merchandise marked J. Petrie, Little Falls, Herkimer Co." The box, as the jury must have found under the charge of the court, was transported safely by the Swiftsure line to Albany. It was then put on board one of the canal boats of the New York and Utica line, which was a regular and safe line of canal boats running between Albany and Utica and passing by Little Falls, to be transported to the latter place. It appears also that there was no community of interest in the profits of transportation between the line of tow-boats and the lines of canal boats; but that the freight of the goods, from New York to Albany, is collected of the line of canal boats to which the goods are delivered to be transported to their place of destination. And that, by the custom, when goods are sent by the tow-boats directed to some place beyond Albany on the canal route, to be sent by some particular canal line, they are to be delivered to that line. If not directed to be sent by a particular line, they are to be forwarded by the first regular and safe canal line.

The box was plundered of its contents, according to the finding of the jury, after it was delivered in good order on board of a boat of the New York and Utica canal line. And the only question is, whether the judge of the court of common pleas was right in receiving the evidence of the commercial usage as to goods sent by tow-boats, where there was no connection between those boats and the canal lines, nor any community of interest between them in the profits of their business: and in telling the jury that the proprietors of the Swiftsure line had discharged their duty, if they had carried the box of goods safely to Albany, and had forwarded it by a safe canal line from there.

¹ Concurring opinions of BOCKEE, PUTNAM, and RHODES, Senators, and the dissenting opinion of PORTER, Senator, are omitted. — ED.

I have no doubt he was right in both particulars. When a box of goods is delivered to a common carrier, marked in a particular manner, without any directions except such as may be inferred from the marks themselves, the carrier has a right to presume that the consignor of the goods intends the carrier shall transport and dispose of them in the usual and customary way. And if the owner of the goods neglects to make the necessary inquiries as to the usage or custom of the business, or to give direction as to the disposal of the goods, it is his own fault; and the loss, if any, after the carrier has performed his duty according to the ordinary course of his trade and business, should fall upon such owner, and not upon the common carrier.

The evidence shows that the plaintiffs in error were not common carriers between New York and Little Falls, but only common carriers of goods from New York to Albany; and were mere forwarders of such goods by the canal lines when they were directed to places beyond Albany, on the canal route. And St. John & Tousey had no more right to expect that these carriers between New York and Albany would themselves carry the box of clothing in question to Little Falls, than they had to suppose they would deliver the other box, forwarded by their tow-boat at the same time, to Hubbard at Chicago. As to both, they must have understood and expected that the owners of the tow-boat line would transport the boxes to the place where their business as common carriers terminated, and send them on in the usual way as forwarders, from that place.

There certainly is nothing in the language of the receipt to make the proprietors specially liable, further than they would have been if no such receipt had been given, and the delivery of the box on board of the tow-boat, marked in that manner, had been proved by the porter by whom it was delivered. It is a simple acknowledgment, by the master of the boat, that he had received from St. John & Tousey a box of goods with a particular mark thereon; which, so far as the giving of the receipt was concerned, was a mere mark of identity. In the case of *Weed v. The Saratoga and Schenectady Railroad Company*, (19 Wend. 534,) the two lines were connected together by an arrangement between themselves; and the agent of the defendant took the pay in advance for the conveyance of the plaintiff and his baggage the whole distance. Or if no actual connection between the two lines was proved, it at least appeared that the defendant permitted its agent to hold it out as a carrier of passengers and their baggage for the whole distance, by taking pay therefor. But nothing of that kind appears in the present case. The case of *Garside v. The Proprietors of the Trent and Mersey Navigation*, (4 Term. Rep. 581,) is in point to show that the plaintiffs in error were not answerable for this box of clothing, without any fault on their part, after it was delivered by their agent to the canal line at Albany.

I think, therefore, the decision of the Supreme Court was wrong; that its judgment should be reversed, and that of the common pleas affirmed.

GRAY v. JACKSON.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1871.

[51 N. H. 9.]

THE defendants are expressmen running from Portsmouth to Boston. They receive, at Portsmouth, besides packages for Boston, packages for all parts of the country, and at the end of their route deliver them to other expressmen to be forwarded. There is no evidence that the defendants have any business connection or arrangement with other expressmen. July 11th, 1865, the plaintiff delivered to the defendants, at Portsmouth, a package containing \$41, directed to "Miss Nancy Thrasher, Reading, Mass.," a place not upon the defendants' route; and the plaintiff paid the defendants fifty cents as the entire expressage from Portsmouth to Reading. The defendants gave the plaintiff the following writing:

"Jackson & Co. Portsmouth and Boston Express. Portsmouth, July 11th, 1865. \$41.00. Received of Calvin Gray, package said to contain forty-one dollars, directed to Miss Nancy Thrasher, Reading, Mass., per Jackson & Co. Marden." The plaintiff knew that the defendants carried packages from Portsmouth to Boston, but did not know whether their line extended elsewhere or not. No notice was given him on this point by the defendants, except so far as such notice may have been given by the above writing and the other facts herein mentioned. When the package was delivered by the plaintiff to the defendants, the plaintiff understood that the defendants undertook to carry it to Reading and there deliver it to Miss Thrasher. The defendants understood that they undertook to do nothing more than they afterwards did. There was no conversation on this matter at the time, but the court finds the understanding of each party to have been as above stated.

The defendants carried the package to Boston, gave it to the agent of the expressman whose route was from Boston to Reading, paid him twenty-five cents, and took his receipt. The Reading expressman appropriated the money to his own use, and has since left this part of the country.

The defendants had no business connection with the express from Boston to Reading.

About four weeks after July 11th, an agent of Miss Thrasher, to whom the Reading expressman had admitted the receipt of the money but refused to pay it over (virtually acknowledging that he had spent it), went with Miss Thrasher to the Boston office of the defendants, notified the defendants of the non-receipt, and demanded the money. About two weeks later, the plaintiff notified the defendants, at their Portsmouth office, that the money had not been received.

The court found a verdict for the defendants, and the plaintiff moved for a new trial.

DOE, J.¹ "Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him." says HOLT, C. J., in *Lane v. Cotton*, 12 Mod. 472, 484, where he names innkeepers and common carriers as engaged in public official duties. One who, in the language of Lord HOLT, "has made profession of a public employment," or "exercises a public employment" (*Coggs v. Bernard*, 2 Ld. Raym. 917), is bound to serve the public while he remains, or professes to remain, in that employment. The obligation of a common carrier of goods is "to receive and carry goods according to his public profession." *Johnson v. M. R. Co.*, 4 Exch. 367, 373.

The defendants have taken upon themselves the public office, trust, and duty of common carriers between Portsmouth and Boston, but not between Boston and Reading. They were under an obligation as common carriers to receive the plaintiff's parcel and carry it to Boston. That was their official duty. Assuming the office, they promise to perform its duties. This is common law. But it was no part of their official duty to carry the parcel to Reading, or to receive it coupled with a contract to carry it to Reading. And when the plaintiff accuses them of violating a contract to carry it to Reading, the plaintiff must prove the contract on which he relies. It is not proved by the official duty of their public employment, because that does not extend beyond Boston. A contract to carry the parcel to Reading must be a mutual understanding of the parties. It may be proved expressly or by implication, by direct or circumstantial evidence, by writing or parol, by words or conduct or usage. The understanding may be mutual, in contemplation of law, if the defendants are estopped to deny that it is mutual.²

These are some of the principal American cases usually cited on the question of the liability of a carrier beyond his own route, in the absence of an express written contract. Some of them are not in point. Many contain nothing but *dicta* on the subject. Some turn on writings held to be, or treated as, express contracts, the construction of which by the court shows the understanding of the parties, without the finding of a jury on parol or circumstantial evidence. Some are based on the mistake of supposing that in *Muschamp's* case the defendants were held liable by the court as a matter of law. Some are controlled or influenced by the mistake of supposing that in *Muschamp's* case the opinions of the judges on the *prima facie* weight of the evidence were opinions on the law. It would seem that in no one of them has the question been held to be, or been treated as, a question of law, where it was claimed to be a question of fact, or where the attention of the

¹ Part of the opinion is omitted. — ED.

² The learned judge here made an elaborate examination of the authorities. — ED.

court was called to the distinction between law and fact, — a distinction which has been clouded by misapprehensions of *Muschamp's* case. In nearly all of them, when there is no decisive contract in writing, it is held to be, or practically treated as, a question of fact. There is much in the American authorities going strongly to show that Lord ABINGER was right, and there is nothing in them having any considerable tendency to show that he was wrong, when he said, in *Muschamp's* case, "The whole matter is therefore a question for the jury to determine what the contract was, on the evidence before them."

There are cases in which a carrier's liability depends upon the terminus of his route, the geographical extent of his public employment; where the question is to what point he has assumed the public duties of a common carrier, and how far he is required by his general public duty to carry goods under pain of an action against him. This is a question of fact. *Walker & a. v. Jackson & a.*, 10 M. & W. 161; *Johnson v. M. R. Co.*, 4 Exch. 367; *Richards v. L. B. & S. C. R.*, 7 Com. B. 839; *Crouch v. L. & N. W. R. Co.*, 14 Com. B. 255; *Williams v. Vanderbilt*, 29 Barb. 491. In some cases, the carrier's liability is considered in a manner tending to show that the question of his undertaking to carry beyond his route was not distinguished from the question of the extent of his route. The question whether the place to which goods are directed is beyond the carrier's route, and the question whether, if it is beyond his route, he undertook to carry the goods to it, may be contested in the same case; sometimes a single piece of evidence has a bearing on both of those questions; and there would often be an inconsistency in holding one of them to be a question of fact and the other a question of law.

In *Nashua Lock Co. v. W. & N. R. Co.*, 48 N. H. 339, 362, there is a statement of some of the consequences of holding, as matter of law, that, when goods are lost on some part of a continuous line of several associated carriers, the carrier on whose section of the line they were lost is alone liable. It is there said that it would often be difficult and sometimes impossible for the owner of the goods to learn where his loss happened; that he would have no means of learning himself, and would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the carriers; that, if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy. The forlorn condition of the owner in such a case is put as an argument against holding, as matter of law, that the first carrier is not responsible beyond his own route.

On the other hand, in *Van Santvoord & a. v. St. John & a.*, 6 Hill 157, 163, 170, there are statements of the consequences of holding, as a matter of law, that a carrier is liable beyond his route. RUODES, Senator, says, "There are many men in this State, who are engaged as

common carriers in the transportation of the produce of the country by land. One of these men receives a load of flour on board his wagon for the purpose of delivering it at some point on the Erie canal, the barrels being marked and directed to a town in the interior of the State of Maine. The carrier neglects to make a special contract that his liability is to cease at the point of delivery on the canal; but he delivers the flour in good order on the canal, and the property is forwarded from one line of transportation to another, until it passes into the hands of the last carrier on the route, by whose want of care it is lost. It would under such circumstances be a most severe and harsh rule of law which should make the person who first undertook the transportation of the article liable for its loss." BOCKEE, Senator, depicts the consequences of such a rule as "most alarming to all who are engaged in freighting and transportation." "Suppose," says he, "the box had been marked 'Brown's Hole, Rocky Mountains.'" If the law implies a contract to deliver the box at that place, he observes, as it is the duty of every man faithfully to fulfil his contracts, the carrier "must abandon his ordinary avocations and business, leave the delights of domestic association, embark with his dear-bought freight, and follow the long lines of internal navigation till he reaches the head waters of the Yellow Stone. Then he must traverse a vast desert, with Indian horses and pack-saddles, exposed to famine, to the wintry storms, to wild beasts and savages; and, if Providence should protect him through every danger, he returns, after years of suffering, a worn-out beggar to a ruined home."

All the weight of these arguments from consequences is against holding the question to be one of law. And they may be arguments proper to be addressed to a jury or other tribunal trying the facts of a case upon the question what the understanding of the parties was.

If the question in this case is of the mutual understanding of the parties, and if that question is one of fact, we are restrained by the constitution from holding it to be a question of law. *State v. Hodge*, 50 N. H. 522-525. The modern practice of trying common law cases by a judge without a jury, and the habit of inferring facts from an agreed statement of facts submitted to the court, and other influences besides those named in *State v. Hodge* (519-521, 525), may contribute to obscure the distinction between law and fact. But when the obscurity is penetrated, and a question is discerned to be a question of fact, no influence can induce the court to decide it as a question of law.

The principal argument for deciding the question in this case as one of law, is drawn from the convenience of a uniform and certain rule. No lack of such a rule has resulted in England from holding it to be a question of fact. The verdicts of English juries seem to be sufficiently settled and invariable to answer any reasonable demand on that score. And there would seem to be no cause to apprehend that any serious inconvenience will be experienced in this State from a want of uniformity and certainty in verdicts on questions of this kind. The sub-

ject cannot be justly subjected to an absolutely inflexible rule. "It might be consoling to the carriers and to others if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances as to steamboat carriage, that is impossible. There will usually be, at every place, some fixed course of doing the business, which will be reasonable, or it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making." *F. & M. Bank v. Champlain Trans. Co.*, 23 Vt. 213, 214.

And if, in ordinary classes of cases in which a fixed and uniform rule would be of great utility, there were danger that verdicts would be variable and uncertain, the danger might not be wholly obviated by holding the question to be one of law. It is said, in *Nashua Lock Co. v. W. & N. R. Co.*, 48 N. H. 346, 357, 363, that there is no little confusion and contradiction of authority respecting the liability of a carrier beyond his own route; that a review of the American cases shows but too plainly that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the American rule; that there is not only much confusion, but no little conflict in the American authorities; and that the perplexing diversity of decision on this subject is such that there would seem to be no remedy unless the national legislature can provide one under the power given by the constitution to regulate commerce. If such is the condition of the authorities, it is proper to be considered in the choice of the tribunals by which the subject is to be settled and put at rest. If courts are now obliged to confess that their inability to establish a uniform rule by their own decisions has thrown the country into such confusion that the interposition of congress is necessary, this is not a favorable occasion for insisting that the need of uniformity requires the matter to be adjudicated by the court instead of the jury. And if the confusion of the authorities is much less than has been supposed, still an examination of them shows that juries have been more successful than courts in establishing a uniform system of rules on this subject.

One serious objection against the practice of turning fact into law is, that it introduces arbitrary rules and disorganizing exceptions into the scientific system of the law, overwhelms that reason which is the life of it (*Co. Lit.* 394 b.), and changes the law into a chaotic collection of fragmentary and incoherent regulations, to be mastered only by sheer force of a rare and marvellous memory.

But the constitutional view is the only one necessary to be considered, because it is conclusive. If trial by jury is as valuable as it seemed to the founders of our institutions, the danger of holding a

matter of fact to be a matter of law outweighs the inconvenience of any uncertainty likely to be produced by verdicts of juries on the liability of carriers beyond their own routes. A single precedent of a matter of fact turned into law is a dangerous thing where precedent is authority. "One precedent creates another. They soon accumulate, and constitute law. What yesterday was fact, to-day is doctrine. Examples are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy." If the court may invade the province of the jury at one point, they may invade it at all points. If they can appropriate a part of it, they can appropriate the whole, and, uniting the offices of judge and jury, which the constitution has divided, destroy the check and balance which have been deemed essential to the judicial branch of a free government. And, were it conceded that we are not now menaced by those governmental invasions of popular rights which our constitutional trial by jury was chiefly intended to defeat, we do not know to what danger future generations may be exposed, nor to what use a precedent, apparently harmless in itself, may hereafter be applied. Whether trial by jury is as valuable as it seemed to the founders of our institutions, is a question not to be debated before a tribunal sworn officially to support that trial as an institution established by the fundamental law.

Upon the question of the understanding of the parties in this case, it may be doubtful whether the mere reception by the defendants of the parcel, directed to a place beyond their route, is evidence of an undertaking to carry the parcel to that place, or to be responsible for its carriage beyond Boston. It may be that they were bound to receive it, and to carry it to the end of their route, and to deliver it there to the next express, according to the usage of the business. If they were bound by the official duty of their public employment to receive it, how could their reception of it be evidence of a contract outside of and beyond their official duty? If their reception of it was within the reach and comprehension of their office, if they could not refuse to receive it and carry it to the next express at the end of their route under pain of an action against them, how could the performance of such a duty be evidence of a contract to perform more than that duty and to serve the plaintiff beyond their route? If the defendants had attempted to throw off a part of the official duty of their public employment between Portsmouth and Boston by a notice given to the plaintiff, there would be no presumption that the plaintiff had waived his legal right and made a contract to release them from a duty which he could require them to perform, or from a responsibility which he could require them to bear. *F. & M. Bank v. Champlain Trans. Co.*, 23 Vt. 205; *Moses v. B. & M. R. R.*, 24 N. H. 88, 89. There would be no presumption that he made a contract to relieve them from their obligation to serve him in anything within the reach and comprehension of their office, which extends from Portsmouth to Boston. And how could a presumption be raised, from their rendering him service between Ports-

mouth and Boston, which they were bound to render, that they contracted to render him service beyond Boston, which they were not bound to render?

But if the plaintiff did not know that the defendants were carriers only as far as Boston, if he believed they were carriers to Reading, if he would not have delivered the package to them had he known they would deliver it to another carrier, and if there was anything in their words or conduct intended to mislead the plaintiff, or which would have induced a man of ordinary care and prudence to entertain the plaintiff's belief and to act upon it, a case of estoppel might be made out. There might be a case in which a carrier's silence and omission to give notice of the extent of his route would be evidence tending to show, by way of estoppel, a mutual understanding that the carrier undertook to carry beyond his route.

Upon the question of a mutual understanding in the absence of conclusive proof in writing, there would ordinarily be the direct testimony of the parties themselves. *Norris v. Morrill*, 40 N. H. 395; *Severance v. Carr*, 43 N. H. 65; *Graves v. Graves*, 45 N. H. 323; *Hale v. Taylor*, 45 N. H. 405; *Delano v. Goodwin*, 48 N. H. 203. The omission of either party to testify on that point might be evidence against him. *Lisbon v. Lyman*, 49 N. H. 568, 575, 580. What was said and done at the time the plaintiff delivered the package to the defendant might give some light on the question. The non-payment of freight in advance, or the prepayment of the whole as one charge or as several charges, might be competent. The usage of the defendant and other carriers might be important. If these defendants and the carrier beyond their route were partners in the through business between Portsmouth and Reading, or had an association or agreement among themselves in relation to it, their partnership or mutual agency might be material; and the absence of such partnership or agency might be material. *Barron & a. v. N. & W. R. Co.*, 100 Mass. 29, 30; *Hill Mng. Co. v. B. & L. R. Co.*, 104 Mass. 134. There might be a great variety both of direct and circumstantial evidence tending to show a mutual understanding, actual or constructive, effected in the minds of the parties by a real concurrence, or in contemplation of law by estoppel. No such mutual understanding, binding the defendants to carry the plaintiff's parcel beyond Boston, was found by the judge who tried the facts in this case.

The authorities on a carrier's liability beyond his own route seem not generally to put it upon the law of the State in which his contract is to be performed. Neither do they expressly make an exception to take this class of cases out of the general rule that the construction and force of a contract are governed by the law of the State in which it is to be executed. *Barter & Co. v. Wheeler & a.*, 49 N. H. 29; *Thayer v. Elliott & a.*, 16 N. H. 102; *Whitney v. Whiting*, 35 N. H. 462; 2 Kent Com., 459. If the part of the defendants' contract, which was to be performed in Massachusetts, is governed by the law of Massachu-

setts, the decisions of that State furnish no ground for granting a new trial in this case. If the defendants should to-morrow obtain one or more charters incorporating them as common carriers between Portsmouth and Boston, and they should, as a corporation, receive another parcel under the circumstances of this case, we cannot suppose that their responsibility would be held, as a matter of law, in Massachusetts, to be different from what it now is. The fact that by the terms of their charter they were carriers only between Portsmouth and Boston, might be evidence on the question whether they intended to undertake for carriage beyond Boston. It would seem that any presumption drawn from their charter, as to their intention on that point, would be an inference of fact and not of law. But the defendants not being a corporation, it seems to be expressly settled that, by the law of Massachusetts, the question whether they undertook to carry the plaintiff's parcel beyond Boston is a question of fact. The judge who tried the case found a general verdict for the defendants, and there must be

Judgment on the verdict.

SWIFT v. PACIFIC MAIL STEAMSHIP CO.

COURT OF APPEALS, NEW YORK, 1887.

[106 N. Y. 206.]

EARL, J.¹ . . . The Panama Railroad Company was organized to construct, maintain, and operate a railroad across the Isthmus, from Panama to Aspinwall; and the Pacific Mail Steamship Company was organized to navigate steamships on the Pacific and Atlantic Oceans. (Laws of 1848, chap. 266, and Laws of 1850, chap. 207.) It is not disputed that the Panama Railroad Company could receive freight at Panama and contract to carry it beyond its terminus through to the city of New York, and that the Pacific Mail Steamship Company could receive freight at the city of New York, and contract to carry it to Aspinwall and thence by the railroad to Panama.

It is the well settled law in this State that a carrying corporation over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and that such a contract is not *ultra vires*. (Weed v. Saratoga & Schenectady R. R. Co., 19 Wend. 534; Wylde v. Northern R. R. Co., 53 N. Y. 156; Root v. Great Western R. R. Co., 45 id. 524; Condict v. Grand Trunk R. R. Co., 54 id. 500.) Such contracts have been upheld sometimes upon the ground of estoppel, and sometimes upon the ground that they were incident to the business for which the contracting corporation was organized. While the defendants admit that such contracts could be made, they contend that the Pacific Mail Steamship Company could not contract to receive goods away from its terminus and to transport them to such terminus

¹ Part of the opinion is omitted. — Ed.

over the route of another carrier, and thence transport them over its own route to their destination. That is, while they admit that the steamship company could receive goods at the city of New York and contract to carry them to Panama on the Pacific coast, they deny that it could receive goods at Panama and agree to transport them to the city of New York. We see no reason for distinguishing between the two kinds of contracts, and for holding that the company could make the one kind and not the other. If when it receives goods at New York for transportation to Panama it is engaged in business authorized by its charter, or incident to such business, then when it procures freight at Panama for transportation to Aspinwall and thence to New York it is also engaged in promoting the legitimate business for which it was organized. It thus procures freight for transportation upon its steamships, and the business it thus does at Panama and across the Isthmus is just as legitimate as it would be to establish agencies on the Pacific coast to solicit freight for transportation from Aspinwall to New York, or to contract with newspapers there to advertise the carrying of such freight. Cannot a railroad company take freight for transportation at a point a few rods from its depot? And if it may a few rods, why not a few miles? If it may have a depot for the receipt of freight one mile from its terminus, why may it not have a depot fifteen or twenty miles therefrom, and transport the freight thence to its road by any means that it chooses to adopt? The Panama Railroad Company terminated on the Pacific coast at Panama, and there it owned lighters to go out into the ocean to take freight from vessels. If it could send its lighters out one mile, why could it not send them out several miles for the same purpose to some convenient port or roadstead? The main business of the steamship company between Aspinwall and New York was to transport passengers and freight which came from the Pacific coast, and instead of taking the passengers and freight at Aspinwall, why could it not take them at Panama? We see no reason for holding that it might not do so in the prosecution of its corporate business, and as incident thereto. Then again, if when the steamship company receives goods at New York under contract to carry them to Panama it is estopped from denying its authority and power to make the contract, why when it receives goods at Panama under contract to be carried to New York should it not be equally bound by estoppel?

We think, therefore, that it is clear upon principle and authority that both defendants were competent to enter into contract to carry this oil from Panama to New York. And as each was competent to contract alone it cannot be doubted that they were competent to make a joint contract to do it. They could even become partners in the transportation business between Panama and New York, and so far as we have discovered, the power of corporations thus to become joint carriers has never been denied but has frequently been recognized. (*Aigen v. Boston & Maine R. R. Co.*, 132 Mass. 423; *Block v. Fitchburg R. R. Co.*, 139 id. 308; *Gass v. N. Y., Providence & Boston R. R. Co.*, 99 N. Y. 220;

Hot Springs R. R. Co. *v.* Trippe, 42 Ark. 465; *Ins. Co. v. R. R. Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H. 9; *Wylde v. Northern R. R. Co.*, *supra*; *Hutchinson on Carriers*, § 160.) The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to transport them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What those limitations are, it is not possible in a general way to define. The New York Central and Hudson River Railroad Company could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York, in order that it might secure the business of transporting such passengers and freight over its route to Buffalo; but it might run ferry boats from Staten Island, or from the New Jersey shore for the purpose of securing passengers and freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for transportation over its route, by a corporate carrier, must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incident to its legitimate corporate business; and our holding is that the Pacific Mail Steamship Company, engaged in transportation upon both the Pacific and Atlantic Oceans, did not go beyond reasonable limits in contracting to take freight at Panama and transport it over the Panama Railroad for delivery to its steamships at Aspinwall, its main business being to take freight coming to it over that railroad.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD CO. *v.*
ROACH.

SUPREME COURT OF KANSAS, 1886.

[35 Kan. 740.]

JOHNSTON, J. This action was brought by Michael Roach against the Atchison, Topeka & Santa Fé Railroad Company, to recover for baggage alleged to have been lost and injured while in transit from New York city to Hutchinson, Kansas. A verdict was given in favor of Roach for \$227.32, and judgment rendered accordingly. The railroad company brings the case here, and complains of the charge of the court and of the insufficiency of the evidence. The essential facts of the case may be briefly stated: On February 28, 1881, Roach purchased eight coupon tickets for the passage of himself and family from the city of New York to Hutchinson, Kansas, over the New York, Lake Erie & Western Railroad, Grand Trunk Railway, Michigan Central Railroad, Chicago, Burlington & Quincy Railroad, Hannibal & St. Joseph Railroad, and Atchison, Topeka & Santa Fé Railroad. The tickets were purchased from one Henry Opperman, who had an office in New York, and who at the same time caused several pieces

of baggage to be checked through to Hutchinson, using checks on which the names of the roads mentioned were stamped. As there was more baggage than could be carried on the tickets purchased, Roach was required to and did pay \$62.15 for extra baggage, and Opperman gave him duplicates of the checks, which he retained. The defendant in error and his family made the journey over the roads mentioned, and the tickets were honored and accepted for their passage, and the servants of the several companies detached the coupons or portions of the ticket that represented the passage-money over the different roads. When the passengers reached Hutchinson application was made for the baggage, and it was found that some of it had been lost, and portions of it badly injured. The testimony tended to show that the baggage was delivered to the first carrier in good condition, but on what road or roads the loss or injury occurred, was not shown. The plaintiff below sought to recover upon two theories: one that Opperman, who sold the tickets, was the agent of the A. T. & S. F. Rld. Co., and that that company undertook to carry the passengers and baggage over the entire route, and that, being the contracting carrier, it was liable for the loss and injury regardless of where and upon what road it occurred. The other theory is, that the several roads constitute a connected and united line, and that the combination and running arrangements existing among the owners of the roads were such as amounted in effect to a partnership, and therefore the injury and loss was a common liability, and each and all of the companies are liable, no matter upon what part of the line the loss occurred. No recovery can be had upon the first theory, for the reason that the testimony wholly fails to establish that Opperman was the agent of the defendant company. Some of the witnesses for Roach spoke of Opperman as the agent of that company, while others stated that he was the agent of the New York, Lake Erie & Western Railroad Company. It was, however, developed upon cross-examination, that they had no knowledge of his authority or agency beyond his action in the sale of the tickets and the checking of the baggage. Opperman testified that he was the authorized agent of the New York, Lake Erie & Western Railroad Company, and sold the tickets for, and as the agent of, that company, and that he did not represent and was not the agent of the defendant company. There was other testimony to the same effect, and also that when Roach purchased his tickets, the defendant company had no tickets on sale in or about the city of New York. The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the company on that ground. Where then is the liability? It is contended by the railroad company that the New York, Lake Erie & Western Railroad Company, being the first carrier, is alone liable. While the railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines to a destination beyond its

own route; and when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. (*Berg v. A. T. & S. F. Rld. Co.*, 30 Kas. 561; *Lawson's Contracts of Carriers*, § 235; *Hutchinson on Carriers*, § 145; *Thompson's Carriers of Passengers*, p. 431; 2 *Rorer on Railroads*, p. 1234.) Of course a railroad company or other common carrier may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier, amounts to an undertaking to carry to the ultimate destination, wherever that may be; and in the absence of any conditions or limitations to the contrary, will make it liable for a loss occurring upon the connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. (*Lawson's Contracts of Carriers*, §§ 238, 239, 240.) But where a railroad company sells a through ticket for a single fare over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket and the checking of the baggage for the whole distance, is some evidence of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an express one, but may arise by implication and may be established by circumstances, the same as other contracts. In *Wisconsin* a passenger purchased a through ticket from the *Chicago & Milwaukee Railway Company* from Milwaukee to New York city, and at the same time delivered her trunk to that company, and received therefor a through check to New York city. Upon arrival at New York the trunk was found to have been opened and some of the articles taken therefrom. The supreme court, in ruling upon the effect of the railway company issuing the through ticket and check, stated that—

“The ticket and check given by the *Chicago & Milwaukee Railway Company* implied a special undertaking by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This we think must in legal contemplation be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket and gave a through check for the trunk, and received the fare for the entire route.” (*Candee v. Pennsylvania Rld. Co.*, 21 Wis. 582; *Ill. Cent. Rld. Co. v. Copeland*, 24 Ill. 332; *Carter v. Peck*, 4 Sneed [Tenn.], 203; *Railroad v. Weaver*, 9 Lea, 38; *B. & O. Rld.*

Co. v. Campbell, 36 Ohio St. 647; same case, 3 Am. & Eng. Rld. Cases, 246; 2 Rorer on Railroads, p. 1001.)

From the authorities, we conclude that the sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which in the absence of other conditions or limitations and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. (Hutchinson on Carriers, § 715; Aigen v. Boston & Maine Rld. Co., 132 Mass. 423; Railroad v. Weaver, 9 Lea, 39.)

The defendant company cannot, however, be held liable upon that ground, because there is no evidence that the baggage was injured or lost while in the custody of that company, nor was it in fact shown upon what part of the route the injury or loss occurred.

The other theory upon which a recovery is sought is, that the several connecting lines over which the baggage was to be carried should be treated as a continuous and united line, and that the arrangements made by the several lines for through traffic was such as to constitute them a partnership. There is a singular lack of testimony in the case, not only respecting the terms of the contract with the passenger, but also in regard to the relations existing among the several carriers. Not a word of testimony was introduced as to the running arrangements between the companies, nor the basis upon which through business was done. The practice or custom of the companies in the past was not shown, neither was there any proof that they had ever coöperated, or had done any through business beyond the transaction in question. It was not even shown what the form of the tickets was, nor what were the stipulations, if any, printed on them. There was in fact no evidence upon which to predicate a theory of partnership, or that each of the companies was the agent of all the others, except the single transaction of selling the tickets and checking the baggage. It is doubtless true that arrangements are frequently made among railroad companies whose lines connect, for through traffic, which constitute them partners. Such an arrangement is greatly to the advantage of the companies; the convenience which it affords the public invites business, and swells the traffic of the companies engaged in the joint enterprise. These arrangements among associated lines render it difficult for the passenger or shipper, in case of loss or injury of his property, to ascertain where the loss occurred; but no such difficulty

lies in the way of the railroad companies; they have the facilities and can easily trace the property to the company which caused the injury or loss. In interpreting the agreements and conduct of associated lines engaged in a through traffic, public policy and the inconvenience mentioned should be considered, and they should be fairly and liberally interpreted towards the patrons of the lines, holding the companies, where it is admissible under the rules of law, to a common liability as partners. But such arrangements for through traffic cannot be held to be a partnership, unless there is a community of interest among the companies, and under which each shares the profits and losses of the enterprise. The mere sale of a through coupon ticket over the connecting lines of several companies, and the checking of the baggage to the end of the route, does not show such a community of interest as would make them partners *inter sese*, or as to third persons. This question has been directly adjudged. A through ticket was purchased for passage from New York to Washington over three lines of railroad which constituted a through line for the transportation of passengers and freight, and the passenger purchasing the ticket received a through check for her baggage. It appeared that the fare received for through tickets was accounted for by the company selling the tickets to the other lines according to certain established rates, but there was no division of losses; and it was held in an action against the last carrier, to recover for lost baggage, that the first carrier was liable for losses occurring on its own line, as well as any other connecting line throughout the whole distance, but that the arrangement of the three companies for the sale of through tickets and the issuance of through checks, while it resembled a partnership, did not constitute one, nor make any of the connecting carriers liable for a loss not occurring on its own line. (*Croft v. B. & O. Rld. Co.*, 1 McArthur, 492.)

In *Hartan v. Eastern Railroad Co.*, 114 Mass. 44, it was ruled that arrangements between connecting roads forming a continuous line for the sale of through coupon tickets, which enabled passengers to pass over all the roads without change of cars, did not imply joint interest or joint liability. In another case, where several carriers whose lines connected made an agreement among themselves to appoint a common agent at each end of a continuous line to sell through tickets and receive fare, it was held that this arrangement did not constitute them partners as to passengers who purchased through tickets, so as to render each of the companies liable for losses occurring on any portion of the line. (*Ellsworth v. Tartt*, 26 Ala. 733.) A somewhat similar case was decided in New York. There a passenger purchased a through ticket from New York to Montreal over several connecting lines of railroad, owned by several companies. The ticket was a strip of paper divided into coupons, whereof one was to be detached and surrendered to the conductor of each line on the route. The passenger, instead of giving his valise into the charge of the agent of the company and receiving a check therefor, kept it in his own charge to the terminus

of the line of the first carrier, where he delivered it to the agent of the connecting line, who checked it through to another point on the road. It appeared that an arrangement had been entered into between the various lines from New York to Montreal to connect regularly. Tickets were sold in New York for the entire route or intermediate places, under the direction of a general agent, who was paid by the several companies. The rate of fare was different on the different roads, and each company received its own proportion of the whole fare or passage-money at the close or at the beginning of every month, according to the established rates of fare. It was held that there was nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage, so as to make one of them liable in common with the others for the loss of the valise. It was decided that "the arrangement may be beneficial to them as well as to the public, inasmuch as by facilitating travel, it may tend to increase it, but that would not create that joint interest, that community in profit and loss, which is essential to the existence of a partnership." (*Straiton v. New York & New Haven Rld. Co.*, 2 E. D. Smith, 184; *Hot Springs Rld. Co. v. Tripple & Co.*, 42 Ark. 465; same case, 18 Am. & Eng. Rld. Cas. 562; *Aigen v. Boston & Maine Rld. Co.*, 132 Mass. 423; same case, 6 Am. & Eng. Rld. Cas. 426; *Darling v. Boston & Worcester Rld. Co.*, 11 Allen, 295; *Kessler v. Railroad Co.*, 61 N. Y. 538; *Irwin v. Rld. Co.*, 92 Ill. 103; *Insurance Co. v. Rld. Co.*, 104 U. S. 146; same case, 3 Am. & Eng. Rld. Cas. 260.)

Among the cases relied on by the defendant in error is *Hart v. Rld. Co.*, 4 Selden, 37. In that case the defendant, which was one of three railroad companies owning distinct portions of a continuous road, was held liable for the loss of the baggage of a passenger received at one terminus to be carried over the whole road. The liability was not, however, based alone upon the selling of the ticket and the checking of the baggage. In addition to through tickets, it appeared that under the agreement made each of the railroad companies ran its cars over the whole route, and employed the same agents to sell passage-tickets. Besides these facts, it appeared that the lost baggage had been placed directly in charge of the servants of the defendant company, and that its loss was due in part to the negligence of that company.

Texas & Pacific Rld. Co. v. Fort, a decision by the Commission of Appeals of the state of Texas, reported in 9 Am. & Eng. Rld. Cases, 392, is also relied on. There it is held that the delivery of through checks upon which were stamped letters indicating the different rail-ways over which the baggage would go, constituted a contract under which the several companies were liable, regardless of the line upon which the loss occurred — a proposition to which we cannot accede. The decision in this case is based upon the ruling in *Hart v. Railroad Co.*, *supra*, which as we have seen, was determined upon other considerations. The same may also be said respecting *Texas & Pacific*

Railway Co. v. Ferguson, another decision of the Commission of Appeals of Texas, 9 Am. & Eng. Rld. Cases, 395, as well as Hart v. The Grand Era, 1 Woods C. C. 184.

The only other case relied on is Wolf v. Central Rld. Co., 68 Ga. 653. It was there held that where a passenger with a through ticket over a connecting line checked his baggage at the starting-point through to his destination, and upon arrival there found that it had been injured, he might sue the railroad company which issued the check or the one delivering the baggage in bad order. Upon the facts in that case the court determined that the company selling the tickets was to be regarded as the agent of the other companies composing the line, and intimated that where a passenger travels over a continuous line on a through ticket, and the baggage is sent on a through check, that any one of the companies may be held liable for spoliation of the baggage, irrespective of the point at which it actually occurred; and the query is also raised as to whether they are jointly liable as partners. The writer of the opinion held that by the sale of the tickets and the division of the receipts at periodical settlements, they acted as principals and not as agents, and that by such action they stood substantially in the position of partners in the through business, and were jointly and severally liable as such. The concurrence of the other justices was, however, placed upon the ground that as the last carrier, and the one which was sued, received the baggage in apparent good condition, it was presumably liable, and the chief justice stated that this was the exact point decided. It is difficult in many cases to determine whether the arrangements and agreements of connecting carriers are such as to constitute each of them principals, or to place them in the relation of partners; but neither upon reason nor authority can we hold that the sale of through tickets and the checking of baggage over the connected lines of several companies, without other proof of their relations or the basis upon which the business was done, is sufficient to make them jointly and severally liable as partners.

The instructions of the court not being in accord with the views herein expressed, and the evidence being insufficient to support the verdict, the judgment of the district court must therefore be reversed, and the cause remanded for another trial.

All the Justices concurring.¹

¹ See Insurance Co. v. Railroad Co., 104 U. S. 146. —ED.

MISSOURI PACIFIC RAILWAY CO. v. YOUNG.

SUPREME COURT OF NEBRASKA, 1889.

[25 Neb. 651.]

REESE, CH. J. Defendant in error delivered to plaintiff in error, at Weeping Water, a piano, to be transported from Weeping Water to Louisville and "delivered to a connecting common carrier," to be conveyed thence to Plattsmouth. The piano was presented to the agent of the Burlington & Missouri River Railroad Co. at Louisville, who declined to receive it, owing to its having been damaged.

It is shown by the evidence that the piano was received by plaintiff in error and transported to its station at Louisville, which was at a point on its line where its road crossed the track of the Burlington & Missouri River railroad, but some little distance from the depot of the latter road, perhaps about one mile; that at the point of crossing there is a mechanical connection of the two tracks by means of what is known as a "Y," and by which cars can be run from one station to another. The piano in question was not transported to the station of the Burlington & Missouri River railroad by plaintiff in error, but was delivered to what is denominated the Louisville Transfer Company for delivery to the Burlington & Missouri River railroad station. This Louisville Transfer Company consisted of two men, Mr. Brown and Mr. Twist, who, as they testified, were in the business of draying or hauling goods of all kinds from one depot to the other, and elsewhere about the town of Louisville, as the owners might direct. When the piano was received at the station in Louisville, the agent of plaintiff in error delivered it to the company of men referred to, who took it upon a wagon or dray, and in unloading it out of the wagon, it being too heavy for the two persons to handle, it fell out of and over the edge of the wagon, and was broken.

As we view the record, the only question presented for decision is, whether or not plaintiff in error complied with the terms of its contract, in delivering to the persons referred to, as "a connecting common carrier."

The evidence leaves no doubt but that the Burlington & Missouri River Railroad Company was a connecting common carrier with plaintiff in error. Their tracks were so arranged as to make the connection and enable them to deliver freight from one to the other at the proper station house. It was, therefore, the duty of plaintiff in error, in compliance with its contract, to deliver the piano to the Burlington & Missouri River Railroad Company at its station. There is no proof that defendant in error had knowledge of the existence of the transfer company as a connecting common carrier. He had the right to depend, and doubtless did depend, upon the conveyance of the property by

plaintiff in error to the station on the other railroad. It appears that plaintiff in error had adopted the custom of transferring freight, when received in car load lots, from their station to that on the other railroad. But that when received in less than car load lots it was delivered to the transfer company, who paid charges, added its own, and delivered to the Burlington & Missouri River railroad, which paid the aggregate charges and forwarded the property. This arrangement, made perhaps for the convenience of the railroad companies and the draymen, could not affect the rights of defendant in error. The same rule must be applied as was applied in the case of *Hooper v. Ry. Company*, 27 Wis. 81.

We do not believe it could be contended with any degree of success that, had plaintiff in error delivered the property in question to a single drayman in Louisville, whether at the request of the drayman or upon its own motion, for delivery at the station of the other railroad, that it could thereby in any degree diminish its responsibility for the delivery to such station by calling such drayman a connecting common carrier. Neither can we see how the rule can be changed by reason of the fact there were two draymen, who called themselves a transfer company. They were simply the agents of plaintiff in error for the purpose of performing an act which plaintiff in error was by its contract bound to perform, but with less trouble and expense to plaintiff in error than to have discharged the duty itself.

The question as to whether the Louisville Transfer Company was a common carrier, was fully and fairly submitted to the jury by proper instructions defining the meaning of common carrier, and by which the whole issue of fact was presented to and passed upon by them. Their verdict being in favor of defendant in error for the amount of damage sustained, is supported by sufficient evidence, and cannot be molested.

The judgment of the district court is affirmed.

*Judgment affirmed.*¹

GOOLD *v.* CHAPIN.

COURT OF APPEALS, NEW YORK, 1859.

[20 N. Y. 260.]

JOHNSON, CH. J. Although we cannot fail to see that the destruction of the goods in question was inevitable and that no blame can be attributed to the defendants for their loss, yet the question whether that loss shall be borne by them or by the plaintiffs must be decided according to the principles which are applicable to the legal relation which the defendants sustained to the goods at the time the fire occurred. The cause and circumstances of the destruction were such as a common carrier is bound to answer for, but not such as suffice to charge a bailee

¹ See *Harding v. International Nav. Co.*, 12 Fed. 168. — ED.

for custody merely. The important inquiry therefore is, whether the goods at their destruction, were in the custody of the defendants as carriers.

The goods were delivered to the defendants in New York to be carried to Albany, and there delivered to another carrier to be transported to Brockport, N. Y. All this appears from the receipt given on the shipment of the goods, which discloses plainly these facts and shows that the parties to whom delivery was to be made at Albany were to receive the goods not as owners nor as general consignees of the owners, but as carriers. In *Van Santvoord v. St. John* (6 Hill, 157), it was held that the first carrier's obligation was discharged when he had safely delivered the goods to the next carrier, but that case did not present any question as to what would amount to such a delivery. The same remark is applicable to *Ackley v. Kellogg* (8 Cow. 223). In both cases the second carrier had actually received the goods and was chargeable as carrier for their safety. It is found by the referee in this case — and as we have not the evidence we must certainly assume the finding to be well warranted — that the Atlantic Line did not receive the goods from the defendants within a reasonable time after notice was given of their arrival and a request that they should be taken away. Assuming that such notice, if given to the owner at the end of the transit, and the unreasonable delay in taking the goods, would have put an end to the liability of the defendants as carriers, yet, as I think, the cases and the nature of the transaction itself point to a distinction between that case and the case of consignee or second carrier. If an undue refusal to receive by the owner at the end of the transit would justify the carrier in renouncing all further care over the goods, it clearly would not in the case of consignee or subsequent carrier, where these relations were known to the first carrier. In *Ostrander v. Brown* (15 Johns. 43), Mr. Justice PLATT, giving the opinion of the court, says: "Suppose the consignees had been dead or absent or had refused to receive the goods in store, what would have been the carrier's duty? Certainly he would have no right to leave them on the wharf or in the street without protection. He would not be justified in abandoning the goods. He had notice that S. and B. were the owners, and if M. and O. would not take charge of the goods as consignees, he ought to have secured them on board his vessel or in some other place of safety." This was said in a case where the goods were left unprotected on a wharf, and the duty of protection was the only point to be made out. In *Fisk v. Newton* (1 Denio, 45), the goods had been stored; the consignee not being found after due search, and the storekeeper having failed and the goods being missing, the question was whether such storing was a defense to the carrier, and it was held that he was not liable. Now the goods in this case were transferred from the boat to the float to enable the defendants to complete their contract by making delivery. The float was not a storehouse in the proper sense of that word. It was a part of the machinery to facilitate the business of car-

riage, which the defendants adopted for their own convenience in performing their contracts to carry and deliver. When the goods were unladen from the boat on which they were brought up the river and placed upon the float, it was a step in performance of the contract to deliver, but not a delivery. The performance was not by that act complete. It was a mode of delivery which undoubtedly promoted the convenience of both sets of carriers, but it did not alter the responsibility of the first carrier who had not yet made delivery. There was no refusal to receive on the part of the second carrier, but there was unreasonable delay. The defendants, however, did not find this delay so unreasonable as to feel compelled to make any new disposition of the goods. They did not remove them from the exposure of a floating vessel, from different parts of which goods were being delivered to different lines, and place them in store. They indulged the other carriers in the delay, as from the course of business was natural and suitable; and until some act was done on their part indicating a clear purpose to make an end of their relation of carriers as to these goods, I think their responsibility as such continued. No owner can be supposed to have an agent to superintend each transshipment of his goods, in the course of a long line of transportation; and if the responsibility of each carrier is not continued until delivery in fact to the next carrier — or at least until the first carrier, by some act clearly indicating his purpose, terminates his relation as carrier — we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others, with no safeguards save those which the rules of law afford. The stringency of the rules belonging to this species of bailment had its origin in public policy, which long experience has approved as wise and salutary. Any other rule in respect to the duty of carriers at such points of transshipment, when unmodified by custom, than that above contained, would give rise and afford protection to the same class of mischiefs against which public policy has protected the community by the strict responsibility imposed upon carriers in other cases.¹

LADUE *v.* GRIFFITH.

COURT OF APPEALS, NEW YORK, 1862.

[11 N. Y. 364.]

APPEAL from the Supreme Court, where the plaintiffs sought to recover damages on account of the destruction of a parcel of leather which, they claimed, had been intrusted to the defendants, as common carriers, and which was destroyed by an accidental fire, in the defendants' storehouse at Buffalo, on the 4th of July, 1851. The trial was before a referee, who found these facts: The plaintiffs were the owners

¹ The concurring opinion of STRONG, J., is omitted. — ED.

of twenty-seven rolls of rough leather, and in the latter part of June, 1851, they caused it to be shipped at Detroit, on board the steamship Hudson, bound for Buffalo, to be transported east, accompanied by a document in the form of a bill of lading. This paper specified the property, and stated the charges of the forwarding agent at Detroit at \$1, that the lake freight was \$4.04, and that it was to go from Buffalo to East Albany at 30 cents per 100 lbs. It was addressed, in the margin thus: "Leander Warren, Leicester, Mass., via Clappville Depot. To be delivered at East Albany; care J. M. Griffith & Co., [the defendants] Buffalo." It did not appear to be signed by the master, or by any one, except H. N. Strong, the forwarder at Detroit.

The defendants' place of business was at Buffalo, where they were engaged in transportation on the Erie canal from that city to Troy and Albany. They were also forwarders and warehousemen, and they were accustomed to receive daily, from the west, property consigned to them in the same manner as the leather in question, and to ship the same to its destination at the east by their canal line, or by other boats on the canal, whichever left first. On the arrival of the vessel from Detroit, on the first day of July, the leather was taken to the defendants' storehouse, and they made an indorsement on the bill of lading as follows: "Received and paid charges, John M. Griffith & Co." It remained in the storehouse until it was burned as before mentioned.

The defendants insisted that, as to this property, they were storehouse keepers and forwarders, and not common carriers. The referee held with the defendants on that question, and reported in their favor, and the judgment being affirmed at a general term, the plaintiffs appealed to this court. The case was submitted on printed points.

SMITH, J. When the property in question was delivered on board the steamboat at Detroit, marked and consigned to Leander Warner, Leicester, Massachusetts, it was so delivered for transportation to that place.

It was known to the shipper, doubtless, that the steamboat Hudson could carry it no further than Buffalo; and it was therefore consigned to the care of the defendants at that place, who were carriers upon the Erie canal, to be carried or forwarded by them by canal, in the regular course of business, to Albany, and then to deliver the same at East Albany, at the railroad depot, to be further transported by the Western Railroad company, via Clappville depot, to Leicester, Massachusetts. The direction upon the bill of lading, consigning the leather to the care of the defendants at Buffalo, made it the duty of the master of the steamboat to deliver it to them, and gave them the right to receive it from him; and thus secured to the defendants the profits incident to the transshipment, storage and carriage of the property, until its transportation by canal was completed, and the property delivered at the railroad depot at East Albany.

No right or duty in respect to such property was conferred by the owner upon any person, after its delivery on board the steamboat at

Detroit, except that of carriage, and such as was incident to its transportation, until its delivery to the consignee at Leicester, Massachusetts. The proprietors of the steamboat Hudson received it as carriers, and so did the defendants, subject, respectively, to all the duties and responsibilities of common carriers.

These goods were placed by the defendants in their warehouse, for their own convenience and for the purpose of being carried; and when goods are so stored, the carrier is responsible for their safe keeping. (Angell on Carriers, § 131, p. 130, and § 144; Story on Railroads, 536.)

The owner of this property had no occasion to have the same placed in a warehouse at Buffalo for any purpose except such as pertained to its safe keeping during its transportation. It was not intended to be stored in warehouses at Buffalo for any purpose. It might doubtless have been transferred immediately from the steamboat to some canal boat at Buffalo; but if the defendants chose for any purpose to put it in their warehouse, it was to subserve their interests, and was at their own risk. The claim of the defendants to escape responsibility for the loss of these goods, upon the ground that they were simply warehousemen, and received them in that capacity, we think entirely untenable.

When a person is both carrier and warehouseman, it is well settled that, if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of a carrier. (Ang., § 133, and Blossom v. Griffin, 3 Kern. 569, 572.) But when goods are deposited in a warehouse subject to the further order of the owner, the case is otherwise. In such case, as Judge BULLER said, in Garside v. The Proprietors of the Trent and Mersey Navigation Company (4 Term, 581), "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods. In such case, the rights and duties and responsibilities of warehousemen would attach to the person having the goods in store." But this rule cannot apply to any person having the charge or custody of the goods while they are *in transitu*. While the goods are in the process of transportation from the place of their receipt to the place of their destination, it will never do in this country, in my opinion, to subject them, in the hands of any carrier, or by his act or order, to the responsibilities of a mere warehouseman. The carrier at common law is an insurer of the goods as against all accidents and perils, except such as result from the act of God or a public enemy. A warehouseman is only responsible for ordinary care, and is merely responsible for loss or injury resulting from his own default or negligence. Millions of property in value in this country is in the constant possession of carriers engaged in transporting it from one place to another. In this particular, it may truly be said that men cast their bread upon the waters, expecting to see it again at a distant point after many days. Goods are shipped, and delivered to carriers by land, at the seaboard or in the

interior of the country, for transportation to distant points, with a simple direction indorsed of the name of the owner or consignee and the place of delivery. It would never do to hold that at any intermediate point such goods, at the option of a carrier, might be stored in a warehouse, and the carrier relieved thereby of his proper responsibility. If the defendants had owned the steamboat in which these goods were shipped at Detroit, no one would pretend, I think, that they could store them at Buffalo in a warehouse, at the risk of the owner, for their own convenience.

I conceive the responsibility of the defendants, in respect to these goods, after they came in their possession, precisely the same, so far as related to their storage at Buffalo, as though they had been carriers for the whole distance from Detroit to Leicester, Massachusetts. Where there are several successive carriers who are engaged in the transportation of goods from the place of their reception to the place of their destination, the liability of each carrier will commence with the reception of the goods, and will continue until they are delivered, according to the usage of the business, to the next carrier in the line of the transit. (*Vanhouten v. St. John*, 6 Hill, 158.) When a carrier deposits property in his own warehouse at some intermediate place in the course of his own route, or at the end of the route where it is his duty to deliver it to the owner, his duty as carrier is not completed, and he will remain liable as carrier for any loss for which common carriers are ordinarily responsible. (*Story on Bailments*, §§ 447, 536; *Forward v. Pittard*, 1 Term, 27; *Hyde v. Trent Navigation Company*, 5 id. 380.) The defendants, I think, are responsible as carriers of the property in question upon the same principle. It was received and stored by them in their capacity or character as carriers as much as if they had received it at Detroit.

I think the judgment of the court below should be reversed, and a new trial granted, with costs, to abide the event.¹

LITTLE MIAMI RAILROAD CO. v. WASHBURN.

SUPREME COURT OF OHIO, 1872.

[22 *Oh. St.* 324.]

WEST, J. A common carrier who receives goods under an agreement to transport them over the whole or any part of his own route, and then to forward them to a destination beyond, acts in the twofold capacity of carrier and forwarder. In the latter capacity, alleged negligence in which is the single ground of controversy presented by this record, he acts as agent of the consignor, and as such, is bound to transmit with reasonable exactness, to the next succeeding carrier, the

¹ The dissenting opinion of DEXIO, C. J., is omitted. — ED.

instructions of his principal. If these instructions be without restriction as to the subsequent route, intermediate consignment, or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent, by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions, in terms sufficiently explicit and unambiguous to inform him of their ultimate destination. *Briggs v. Boston and Lowell R. R. Co.*, 6 Allen, 249. But if the instructions of the consignee be special and restrictive, the carrier will not have performed his duty as forwarding agent, if he shall have neglected or omitted to transmit, with the delivery of the goods to the next carrier, any material or substantive part of such special instructions. Whence it follows, as a necessary consequence, that he shall stand responsible for and make good any loss to which such negligence or omission shall have contributed. *Redfield on Carriers*, sec. 186.

The jury, on the trial below, must have found — and we cannot hold the finding not warranted — that the consignor of the goods, the loss of which is disclosed, gave special instructions in regard to their transmission; that these instructions were written in the freight way-bill, which came into the possession of the plaintiff in error, and are in these terms: “H. H. Washburn, Martinsburg, Mo., N. M. R. R. *via* Cincinnati and St. Louis;” that the plaintiff in error, when it delivered the goods to the Cincinnati Transfer Company, which was the next succeeding carrier, failed to transmit the whole of said instructions, but omitted therefrom the letters “N. M. R. R.”; that these letters are well known to all competent western carriers to be the initials of the North Missouri Railroad, having its eastern terminus at the city of St. Louis; that the presence of these initials in the shipping-bills indicated that the North Missouri Railroad Company was an intermediate consignee of the goods at St. Louis; and that their omission left them without consignee at that place.

The instructions, thus transmitted by the plaintiff in error to the Cincinnati Transfer Company, showing no consignee of the goods at St. Louis, the agent of the latter volunteered to constitute a consignee thereof at that city, which he would not have done if the instructions had contained the omitted initials. On this point, the testimony of Healey, agent of the Transfer Company, is explicit. He says, “If the way-bill, which I received from the Little Miami Railroad Company, had been marked with the initials ‘N. M. R. R.,’ I would not have consigned the goods to the care of C. A. Scott & Co., and they would have been shipped to the North Missouri Railroad. . . . The St. Louis Transfer Company would have carried them from the Ohio and Mississippi Railroad, in St. Louis, to the depot of the North Missouri Railroad.”

Thus it is apparent that the act of the Cincinnati Transfer Company, which resulted in the loss of the goods, was, in point of fact, induced

or influenced by the omission of the plaintiff in error to transmit to the next carrier *en route* the consignor's special instructions.

It is asserted for the plaintiff in error, however, that the interpolation of an intermediate consignee, into the instructions transmitted by it to the Cincinnati Transfer Company, without providing against the contingency of a failure, or refusal, to receive the goods by him, made the Transfer Company liable; that otherwise the Ohio and Mississippi Railroad Company would not have been limited in its discretion to the delivery of the goods to a particular carrier at St. Louis, but would have had the option to make the transit of the city effectual by the employment of any carrier willing to accept the service.

It is also insisted that the Ohio and Mississippi Company, to whom freight was guaranteed, made itself liable by refusing to guarantee freight to Scott & Co., in consequence of which the goods were suffered to perish.

In the view we have taken of the questions presented, it is not necessary to consider or controvert either of these positions. Both are probably tenable, and the plaintiff in error may sustain to the Cincinnati Transfer Company the relation of consignor, whose instructions have been departed from; in consequence of which, a right of recovery over has accrued to the former. But whatever may be the liability of others, either among themselves, or to the defendant in error, the fact that the negligence of the plaintiff in error contributed to a loss for which others may be severally liable may, notwithstanding, give a right to a several recovery against it also.

2. This conclusion is not varied by the fact that the packages bore labels containing the omitted initials, it not appearing that these inscriptions came to the knowledge of the transfer company's agent, charged with the duty of receiving and transmitting shipping-bills. Packages are often sent forward in close coaches, without reshipment, or inspection. The accompanying papers are presumptively correct, and the carrier receiving them may well rely on the accuracy of the instructions therein written without resorting to the inscriptions on the packages.

At the trial below, counsel for the plaintiff in error asked the court to give certain instructions, which were submitted in writing. The court having examined and approved them, instead of reading them to the jury, directed the manuscript to be handed to them, the counsel at the time not objecting. It was too late, after verdict, to except to this mode of instructing the jury. If it is ground of exception at all, the exception should have been noted at the time.

In the light of the whole record, then, we cannot say, as matter of law, that the omission, by the plaintiff in error, of a material part of the consignor's special instructions from the transmitted way-bill, which the jury found contributed, in point of fact, to the alleged loss, created no liability.

The judgment of the Superior Court will be affirmed, with costs.

RAWSON v. HOLLAND.

COURT OF APPEALS, NEW YORK, 1875.

[59 N. Y. 611.]

ANDREWS, J. The defendant was a common carrier of the goods in question, from the city of New York to Detroit, Michigan. It received them at New York "to be forwarded to Detroit only," and the express terms of the undertaking exclude any inference or implication that it was to carry them further. But Detroit was not the final destination of the property. The box was marked "Day & Lathrop, Dryden, Michigan, via Ridgway," clearly indicating that Dryden was the ultimate destination, and that the transit was by some agency to be continued, from Detroit via Ridgway, to the place of consignment.

The defendant was not bound to carry the goods beyond Detroit. It performed its contract in respect to the actual carriage upon carrying them to that place. But the obligation of a carrier is not fully discharged by transporting the goods from the place of shipment to the place of consignment, or in case of an intermediate carrier, from the place of shipment to the end of his route. The undertaking to transport the goods to a particular place, includes the duty of delivering them there in safety. (*De Mott v. Laraway*, 14 Wend. 225.) What is due delivery depends upon the nature of the carriage; whether by ship, rail or other conveyance, and also upon the facts whether the carrier in the particular case is an intermediate carrier, or is the one who transports the goods to their final destination, and the mode of delivery may, in some cases be controlled by custom and usage. In all cases, however, there must be a delivery by the carrier, or something tantamount to a delivery, before he rids himself of his responsibility as such. In the case of an intermediate carrier, who accepts goods to be carried to a point short of their final destination, directed to a place beyond the termination of his route, the law from such direction, in the absence of other special circumstances, implies an undertaking on his part to deliver them, at the end of his route, to the next succeeding carrier in the line of transportation, and if such carrier refuses or neglects to receive them, the first carrier may store the goods, and then the nature of the bailment changes and he is relieved from the stringent responsibility originally assumed, and the liability of a warehouseman is substituted. (*Van Santvoord v. St. John*, 6 Hill, 157; *Goold v. Chapin*, 20 N. Y. 259; *McDonald v. Western R. R. Co.*, 34 id. 497; *Root v. The Great Western R. R. Co.*, 45 id. 524; *Mills v. Michigan Cen. R. R. Co.*, id. 622; *Nutting v. Conn. River R. R. Co.*, 1 Gray, 502.)

In this case the defendant did not, on the arrival of the goods at Detroit, offer them to any other carrier for transportation beyond that

point, or give notice to any other carrier of their arrival. They were deposited in the defendant's warehouse and remained there for about twenty days, when they were destroyed by an accidental fire which happened without fault or negligence of the defendant. The failure to deliver to another carrier did not result from the fact that there was no carrier on the route designated by the direction, to whom delivery could be made. The Grand Trunk Railway Company operated a line of railway from Detroit to Ridgway, a station on that road, and was the customary and usual carrier to Ridgway, of goods sent from Detroit to Dryden via Ridgway, and, so far as appears, there was no other public carrier between these places.

The defendant not having delivered or tendered the goods to the Grand Trunk Railway, is, under the general rule of law, liable for the loss, and it must be so adjudged unless the case is taken out of the rule by the special circumstances relied upon.

There are, however, two grounds upon which it is claimed that the defendant was excused from delivering the goods to the Grand Trunk Railway: first, that by a regulation of that company of which the defendant had notice it would not receive goods for transportation unless the shipper would accept a receipt containing certain exemptions from the liability imposed upon carriers at common law; and, second, that by a custom of the defendant, goods carried by its line to Detroit destined to points on the Grand Trunk Railway, were detained until notice was given to consignees, and their direction taken as to sending them by that road, and that such notice was given in this case, and the goods were destroyed before any direction had been given. We do not think that either of these answers is sufficient, under the circumstances of this case, to relieve the defendant from liability.

The direction on the box was a clear indication that Rawson, Buckley & Co., the shippers, designed that it should be sent from Detroit to Dryden via Ridgway, and was in effect a direction to the defendant to send them by the usual mode of carriage from Detroit to that point. The defendant was entitled to regard the shippers as authorized to direct as to the mode of transportation, whatever their actual relation to the goods may have been, whether in fact they or the consignees were the owners. The direction that the goods should be sent via Ridgway, coupled with the fact that the Grand Trunk Railway was the usual carrier between Detroit and that place, authorized the defendant to deliver the goods to that company, upon the usual contract required, and in case of loss after such delivery and while they were in possession of that company, the defendant would not have been liable, although the Grand Trunk Railway under its contract might have been exempted from liability also. (*Nelson v. The Hudson River R. R. Co.*, 48 N. Y. 507; *Squire v. New York Central R. R. Co.*, 98 Mass. 240; *Barnett v. Lond. and N. W. R. R. Co.*, 5 Hurl. & Nor. 604.)

There is nothing decided in the case of *Lamb v. Cam. and Amboy R. R. Co.* (46 N. Y. 271), which conflicts with this view. In that case

there was no indication in the contract of the first carrier, as to the particular route or company by which the goods were to be sent from Chicago, nor so far as it appears was it necessary that the first carrier should consent to a restricted liability in order to procure the goods to be carried from that point, and as he had guaranteed that they should be carried to the final destination at a specified through rate, it perhaps might justly be inferred that they were to be carried from Chicago under a contract as favorable as that made with the first carrier. We, however, confine our decision to the case presented on this record, and are of opinion that the defendant was not excused from tendering the goods to the Grand Trunk Railway, and that he would have been justified in delivering them to that road, and in accepting the usual contract required by the company.

The defence founded upon the alleged custom is we think wholly insufficient. The proof is that up to a short time before the shipment of these goods, the Grand Trunk Railway had not exacted of the defendant a compliance with the general rule of the company, but had received its goods on the *forms* used by the defendant. This had been changed in 1865, or 1866, and the regulation was thereafter enforced as to goods received from the defendant. The defendant from that time was accustomed to detain goods destined to points on the Grand Trunk Railway, and advise the consignees, and await their direction before sending them forward, and in this case written notice was sent to "Day & Lathrop" of the arrival of the goods, but they gave no instructions.

It is said in *Van Santvoord v. St. John* (6 Hill, 160), that a carrier who receives a box marked in a particular way, without any directions, except such as may be inferred from the marks themselves, has a right to presume that the consignor intends that he shall transport and dispose of them in the usual and customary way. That was the case of a carrier by tow boats on the Hudson river, who received a package marked "J. Petrie, Little Falls, Herkimer county," and it was held that the first carrier was justified in delivering it at the end of his route to a succeeding carrier by canal, and was discharged thereby from further responsibility; it being shown that there was a general, established and uniform usage in the business, that such delivery might be made; and it was also held that the consignor was bound by it whether he knew it or not. And in *Gibson v. Culver* (17 Wend. 305) it was held that the general obligation created by law in respect to the mode of delivery by a carrier, may be controlled by a uniform usage and course of the business in which he is engaged. In this case the proof falls far short of establishing a custom superseding the general obligation of the defendant to make delivery of the goods to the next carrier. At most it was a usage recently established, and confined to the particular business of the defendant at a particular place, not known to the plaintiffs, and which they were not bound to ascertain.

The usage relied upon in this case lacks the essential elements of a

valid usage. It is neither general, established, uniform, or notorious. It would be unreasonable to give it effect in this case, to defeat a recovery by the plaintiff. The parties did not make their contract in reference to it, and cannot be presumed to have done so.

It is the general rule, that a local usage must be shown to have been known to a party before he will be held to be bound by it. (*Smith v. Wright*, 1 Caines, 43; *Stevens v. Reeves*, 9 Pick. 198; *Krechner v. Venus*, 12 Moore's P. C. C. 361; *Bartlett v. Pentland*, 10 B. & C. 760; 1 Smith L. C. 836; 2 Parsons on Cont. 541, note.)

The conclusion is, that the defendant, at the time of the fire, held the goods as a common carrier, and is responsible for the loss under the general rules of law. If the exemption in the bill of lading from liability for loss by fire can be construed as applying to the goods after the transit to Detroit was ended, the delay in delivering them to the Grand Trunk Railway was a violation of duty which deprived the defendant of the benefit of it. (*Michaels v. N. Y. Central R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, id. 630; *Maghee v. Cam. and Amboy R. R. Co.*, 45 id. 514; *Condict v. The G. T. R. R. Co.*, 54 id. 500.)

PRATT v. RAILWAY CO.

SUPREME COURT OF THE UNITED STATES, 1877.

[95 U. S. 43.]

HUNT, J. The Grand Trunk Railway Company is engaged as a common carrier in the transportation of persons and property. This action seeks to recover damages for a violation of its duty in respect to certain merchandise shipped from Liverpool to St. Louis, and carried over its road from Montreal to Detroit. The goods reached the city of Detroit on the 17th of October, 1865, and on the night of the 18th of the same month were destroyed by fire.

The defendant claims to have made a complete delivery of the goods to the Michigan Central Railroad Company, a succeeding carrier, and thus to have discharged itself from liability before the occurrence of the fire.

If the liability of the succeeding carrier had attached, the liability of the defendant was discharged. *Ransom v. Holland*, 59 N. Y. 611; *O'Neil v. N. Y. Central Railroad Co.*, 60 id. 138.

The question, therefore, is, Had the duty of the succeeding carrier commenced when the goods were burned?

The liability of a carrier commences when the goods are delivered to him or his authorized agent for transportation, and are accepted. *Rogers v. Wheeler*, 52 N. Y. 262; *Grosvenor v. N. Y. Central Railroad Co.*, 59 id. 34.

If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit amounts to notice, and is a delivery. *Merriam v. Hartford Railroad Co.*, 24 Conn. 354; *Converse v. N. & N. Y. Tr. Co.*, 33 id. 166.

The liability of the carrier is fixed by accepting the property to be transported, and the acceptance is complete whenever the property thus comes into his possession with his assent. *Illinois Railroad Co. v. Smyser*, 38 Ill. 354.

If the deposit of the goods is a mere accessory to the carriage, that is, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received; but, when they are subject to the further order of the owner, the case is otherwise. *Ladue v. Griffith*, 25 N. Y. 364; *Blossom v. Griffin*, 13 id. 569; *Wade v. Wheeler*, 47 id. 658; *Michigan Railroad v. Schurlz*, 7 Mich. 515.

The same proposition is stated in a different form when it is said that the liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the succeeding carrier for further transportation, and an acceptance by him. Auth. *supra*.

The precise facts upon which the question here arises are as follows: —

At the time the fire occurred, the defendant had no freight room or depot at Detroit, except a single apartment in the freight-depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition-wall between them. There was a railway track in the centre of the building, upon which cars were run into the building to be loaded with freight. The only use which the defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as herein-after mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred-weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not fur-

ther handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight-building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight-building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight-charges due thereon; that, from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor delivered his copy of said way-bill to the checking-clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking-clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated.

1. They were placed within the control of the agents of the Michigan Company.

2. They were deposited by the one party and received by the other for transportation, the deposit being an accessory merely to such transportation.

3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company.

4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, "P. & F., St. Louis," were sufficient notice that they were there for

transportation over the Michigan road towards the city of St. Louis ; and such was the understanding of both parties.

The cases heretofore cited in 20 Conn. 354, and 33 id. 166, are strong authorities upon the point last stated.

In the latter case, a railroad company and a steamboat company, had a covered wharf in common, at their common terminus, used as a depot and a wharf ; and it was the established usage for the steamboat company to land goods for the railroad, on the arrival of its boats in the night, upon a particular place in the depot, whence they were taken by the railroad company, at its convenience, for further transportation, both companies having equal possession of the depot. There was no evidence of an actual agreement that the goods deposited were in the possession of the railroad company, and the goods in question had not been in the manual possession of the railroad company when they were destroyed by fire on the Sunday afternoon following their deposit on the previous night. It was held that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad should take it thence at their convenience. The delivery to the succeeding carrier was held to be complete, and a recovery against the first carrier for the loss of the goods was reversed.

In *Merriam v. Hartford Railroad Co.*, *supra*, it was held that if a common carrier agree that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit alone is a sufficient delivery ; and that such an agreement may be shown by a constant practice and usage so to receive property without special notice.

The plaintiff contends that the goods were not in the custody and under the control of the Michigan road, for the reason that the case states that they "are in a section of the freight-depot set apart for the use of the defendant." This is not an accurate statement of the position. The expression quoted is used incidentally in stating that, when the agent of the Michigan road saw "goods deposited in the section of the freight-building set apart for the use of the defendant, destined on the line of said Central railroad, he would call upon the agent of defendant, and, from a way-bill," obtain a list of the goods, and their destination. Just how and in what manner it was thus set apart appears from the facts already recited. It was a portion of the freight-house of the Michigan Company, in which a precise spot was selected or set apart, where the defendant might deposit goods brought on its road and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan Company, and to be loaded on to its cars at its convenience, without further orders from the defendant.

We are of the opinion that the ruling and direction of the circuit judge, that upon the facts stated the defendant was entitled to a verdict and judgment in its favor, was correct, and the judgment should be affirmed.

Judgment affirmed.

ADAMS EXPRESS CO. v. HARRIS.

SUPREME COURT OF INDIANA, 1889.

[120 *Ind.* 73.]

ELLIOTT, C. J. — The material facts pleaded by the appellees as their cause of action are these: On and prior to the 17th day of January, 1885, they were partners, engaged in business as nurserymen; on that day a lot of fruit trees was delivered to the United States Express Company at Champaign, Illinois; the trees were owned by the plaintiffs, and were directed to them at Mooresville, Indiana; the United States Express Company undertook to carry the trees to Indianapolis, and there deliver them to some other carrier to be transported to their destination; a written contract was made between the United States Express Company and the plaintiffs, which contained, among others, these provisions: That the person or corporation to whom the trees shall be delivered for transportation from the end of that company's line to their destination, shall not be deemed the agent of the company, but shall be deemed the agent of the plaintiff; that the company shall not be liable for injury to the goods, unless it "be proved to have occurred from the fraud or gross negligence of the company or its servants, nor shall any demand be made upon the company for more than fifty dollars, at which sum said property is hereby valued." There is no provision in the contract for the benefit of any carrier except the United States Express Company, nor is any other carrier named. The trees were delivered to the defendant in good condition, at Indianapolis, and it carried them to Mooresville; after they had reached there, the plaintiffs went to the office of the defendant prepared to pay the charges and receive the trees, and, although they were then in the possession of the defendant's agent, he denied that they had been received; on a subsequent day the plaintiffs went again to the defendant's office, received the trees and paid the freight on them. The trees were so injured, through the negligence of the defendant, as to be utterly valueless. The plaintiffs had sold the trees to divers persons, and had agreed to deliver them on the 19th day of October, 1885, and the refusal of the defendant to deliver the trees when first demanded caused the plaintiffs to lose the profits of the sales made by them, for the reason that the delay prevented them from delivering the trees to the purchasers in accordance with their contract.

The contention of the appellant is, that the contract between the United States Express Company and the plaintiffs bound both them and the appellant, that the latter, when it accepted the goods for transportation, became bound to comply with the provisions of the contract, and secured a right to all its stipulations in favor of the first carrier,

and that the contract continued in force for the benefit of all the parties until the goods were delivered at their destination. The opposing contention is, that the contract between the United States Express Company and the plaintiffs did not inure to the benefit of the appellant, and that when it accepted the goods for transportation it received them under the law, and became bound by the ordinary rules which prevail in cases where there is no special contract.

If the appellant had been designated in the contract with the first carrier as one of the intermediate carriers, or if the contract had provided that its stipulations should enure to the benefit of all the carriers, then the contention of the appellant would find strong support from the authorities. *U. S. Express Co. v. Harris*, 51 Ind. 127; *St. Louis, etc., R. W. Co. v. Weakly*, 50 Ark. 397; *Halliday v. St. Louis, etc., R. W. Co.*, 74 Mo. 159 (41 Am. Rep. 309); *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Maghee v. Camden, etc., R. R. Co.*, 45 N. Y. 514; *Lamb v. Camden, etc., R. R. Co.*, 46 N. Y. 271.

But the contract does not provide that its stipulations shall inure to the benefit of any other carrier than the one with whom it was made, nor does it designate any other carrier along the line. Its provisions apply only to the carrier with whom the contract was directly made, and they leave it to that carrier to select the carrier from the termination of its line to the end of the route. The authorities are substantially agreed that in such a case the intermediate carrier can not successfully claim the benefit of the provisions of the original contract. *Martin v. American Ex. Co.*, 19 Wis. 356; *Baneroft v. Merchants, etc., Co.*, 47 Iowa, 262 (29 Am. Rep. 482); *Merchants, etc., Co. v. Bolles*, 80 Ill. 473; *Camden, etc., R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616.

The rule declared by the decisions we have referred to is the only one that can be defended on principle, for where the contract designates only one carrier, there is no privity between the owners and the undesignated carriers; but where the contract is a through one, by designated carriers, there is a privity of contract, for it is justly inferable that the contract was intended for the benefit of all who perform services under it. So, too, where the contract declares that it is for the benefit of intermediate carriers, it may be enforced, since it is a contract for the benefit of a third person; and as it is beneficial to him it is natural to presume that its terms were assented to, and formed the contract under which the goods were transported. Where, however, the contract is solely for the benefit of the original parties it is not possible to apply this rule to it.

Where, as here, the names of the plaintiffs are given in full in the title of the cause, it is unnecessary to repeat them in alleging that the plaintiffs were partners. It is sufficient to allege that the plaintiffs were partners without again giving their names. The name of the defendant imports that it is a corporation, and it was, therefore, not necessary to specifically aver that it was a corporation. Adams

Express Co. *v.* Hill, 43 Ind. 157; Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; Sayers *v.* First Nat'l Bank, 89 Ind. 230.

The defendant's denial of the possession of the goods at Mooresville excused the plaintiffs from making a tender of the carrier's charges. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made. Vinton *v.* Baldwin, 95 Ind. 433, and cases cited; Mathis *v.* Thomas, 101 Ind. 119; Platter *v.* Board, etc., 103 Ind. 360; House *v.* Alexander, 105 Ind. 109.

Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent made while endeavoring to secure an adjustment of the claim are competent evidence against his principal. This general rule has often been applied in insurance cases, and must necessarily apply in such cases as this; for otherwise the corporation would be entirely without a representative.

In deciding, as we have, that the provisions of the contract with the United States Express Company cannot be taken advantage of by the appellant we have disposed of the point that the damages are limited to fifty dollars; but if we were wrong in this, still the limitation will not control since there is evidence of negligence, and no evidence that a lower rate of freight was given on account of the limitation placed upon the value of the property. Rosenfeld *v.* Peoria, etc., R. W. Co., 103 Ind. 121; Bartlett *v.* Pittsburgh, etc., R. W. Co., 94 Ind. 281; United States Ex. Co. *v.* Backman, 28 Ohio St. 144.

As there was evidence of negligence, and no evidence that there was any special consideration inducing the owners to place a less value on their property than its actual worth, the limitation, even conceding it to be available to the appellant as a part of the contract, is nullified.

The instructions of the court are quite as favorable to the appellant as the law warrants, and the evidence fully supports the verdict.

MAGHEE v. CAMDEN AND AMBOY RAILROAD TRANSPORTATION CO.

COURT OF APPEALS, NEW YORK, 1871.

[45 N. Y. 514.]

ANDREWS, J. It will be convenient to consider in the first place, the nature and extent of the obligation of the Jeffersonville Railroad Company, under the contract of June 21, 1864, for the transportation of the property in question.

The road of that corporation commenced at Jeffersonville, on the Ohio River, in the State of Indiana, opposite Louisville, Kentucky, and terminated at Indianapolis, in the former State.

The goods were delivered to the corporation at Louisville, by the agent for the plaintiff, and on their receipt, a bill of lading was signed, whereby the Jeffersonville Railroad Company expressly agreed to deliver them to the plaintiff, in the city of New York, upon the payment by the plaintiff or his assigns of a specified freight.

The undertaking of the corporation to deliver the goods was not absolute, but was qualified by the exception stated in the bill of lading, of "unavoidable accident of the railroad and fire in the depot," and after the specification of the freight to be paid, were the words and letters "all rail P. R. R."

The execution of the bill of lading by the Jeffersonville Railroad Company, and its acceptance by the plaintiff, concurrently with the delivery and receipt of the property, constituted a special contract between the parties for the carriage of the goods.

That corporation undertook, thereby, the carriage for the whole distance between Louisville and the city of New York, and it could not perform its contract to carry, except by the use of the roads of other corporations connecting with it, and forming a consecutive route to the city of New York.

That a railroad corporation may bind itself, by a contract to carry goods to a point beyond the terminus of its own line of road, is affirmed by the general current of authority, in England and in this country. (*Muschamp v. Lancaster R. R. Co.*, 8 M. & W. 421; *Mucha v. London and S. W. Railway Co.*, 2 Exch. 415; *Perkins v. Portland*, 47 Me. 573; *Meyer v. Rutland, etc., R. R.*, 27 Vt. 110; *Redfield on Railways*, 284 and cases cited.)

And in this State the doctrine, if not established, has been recognized in several cases. (*Ward v. Saratoga and Schenectady R. R. Co.*, 19 Wend. 534; *Hart v. Rensselaer and Saratoga R. R. Co.*, 4 Seld. 37; *Burtis v. The Buffalo and State Line R. R. Co.*, 22 N. Y. 269; *Schrader v. Hudson R. R. Co.*, 5 Duer, 55.)

There is a conflict between the English and American cases, as to the evidence by which a contract of a railroad corporation, to carry beyond the terminus of its own route, may be established; but this difference is immaterial in this case, as the contract of the Jeffersonville Railroad Company was express and unambiguous.

If the power of a railroad corporation, not specially authorized by its charter to make such a contract, is doubtful, such authority must be presumed in this case. The charter of the Jeffersonville Railroad Company is not in evidence, and it is to be assumed, in the absence of proof, that the contract was not *ultra vires*, or made in violation of law.

The plaintiff, then, by the contract, employed that corporation as carrier for the whole distance: and it was liable to the plaintiff for any default in performing it, whether such default occurred on its own road, or the road of any other corporation in the course of the transit.

If, however, the action had been brought against the first carrier to

recover the value of the goods, the plaintiff could not have recovered, if the defendant in such suit could have shown that they were lost by a peril, within the exception in the bill of lading, and without negligence on the part of itself or its agents. (*Clark v. Barnwell et al.*, 12 How. U. S. 272.)

It is claimed by the plaintiff, that the language "unavoidable accidents of the railroad, and of fire in the depot," refers to loss from the excepted causes, while the goods were on the road or in the depot of the Jeffersonville Railroad Company, and creates no exemption from liability for such loss occurring elsewhere.

If this is the true construction, the plaintiff was entitled to recover, although the liability of the defendant was measured by that of the first carrier. The defendant at the time of the loss by fire, held the goods as carrier, and they were not destroyed by unavoidable casualty.

But we are of opinion, that the exception applies to a loss by accident or fire upon any road or in any depot while the contract of carriage is in force.

The exception is in the same clause with and immediately follows the engagement of the Jeffersonville Railroad Company to deliver the goods in the city of New York.

It is reasonable to suppose that the compensation fixed for the carriage had relation to the restricted liability assumed by the bill of lading. The Jeffersonville Railroad Company, by undertaking to carry the goods to the ultimate destination, had an interest to make the exception commensurate with the scope and duration of its contract, and construing the contract with reference to the circumstances and subject-matter, the limit and construction of the language of the exception, claimed by the plaintiff, is not justified.

The fire occurred while the goods were at the place where the defendant was accustomed to receive, deposit and keep ready for transportation or delivery the merchandise carried by it, to and from the city of New York, and this was a depot within the general signification of that word.

Leaving out of view, for the present, the words in the contract "all rail," it follows from what has been stated, that no recovery could have been had by the plaintiff against the Jeffersonville Railroad Company for the loss in question.

But the plaintiff insists that he stands in a more favorable position in respect to the defendant, and that the defendant having participated in the carriage of the goods, and the loss having occurred while they were in its possession as carrier, it must be deemed to have taken the goods subject to the common-law liability of carriers, and that it cannot claim the benefit of the exemption in the original contract.

It does not appear under what agreement the defendant received the goods, beyond the fact contained in the stipulation of the parties, and found by the court, that the goods were transported by the several

connecting lines upon an understanding and agreement between them to share the freight specified in the bill of lading, and that the defendant should collect the whole freight for the common benefit.

In what proportion the division was to be made, or whether any company was to receive anything beyond the usual charge for the transportation over its road is not shown. It is not found that the several companies participating in the service were partners, and if the division was to be made as last suggested, the arrangement would not constitute a partnership between them. (*Welby v. West Cornwall Railway Co.*, 2 H. & N. 702; *Mylton v. The Midland Railroad Co.*, 4 H. & N. 614.)

It is to be inferred, however, from the fact found, and the circumstances, that the goods were carried by the several connecting companies under some arrangement having relation to the plaintiff's contract with the first carrier. They were to share the freight "specified in the bill of lading."

The bill of lading, or a duplicate, usually, if not uniformly, accompanies the goods.

It was the duty of the Jeffersonville Railroad Company, under its contract, to provide for the transportation of the goods from the terminus of its road, by other lines; and no intervention of the plaintiff having been shown, it must be held that the connecting roads were acting under the employment of that corporation.

If the defendant took and carried the goods by contract made with the Jeffersonville Railroad Company, without any restriction of its ordinary liability, then it would not be denied that the plaintiff could avail himself of that contract, and recover of the defendant, notwithstanding the express contract with the Jeffersonville Railroad Company as carriers for the entire route.

All such contracts made by the first carrier would inure to his benefit, and he could at his election adopt them. (*Merchants Bank v. New Jersey Steam Nav. Co.*, 6 How. U. S. 380; *Green v. Clarke*, 2 Ker. 343; *Sanderson v. Lamberson*, 6 Binn. 129; 2 Green. Ev. § 210.)

But the plaintiff did not show that the defendant undertook to carry the goods under a contract more favorable to him than that which he made with the Jeffersonville Railroad Company; and the evidence does not authorize the inference that such a contract was made.

The defendant is to be regarded as having acted under and in subordination to the contract made with the first carrier, and can claim the benefit of any exception to which the Jeffersonville Railroad Company would have been entitled, if the action had been brought against that corporation.

The words, "all rail," inserted in the bill of lading, constituted a direction by the owner and an agreement by the carrier that the transportation should be by rail, in distinction from any other mode of conveyance.

When a carrier accepts goods to be carried with a direction on the

part of the owner, to carry them in a particular way, or by a specified route, he is bound to obey such direction; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exceptions in the contract. (*Danseth v. Wade*, 2 Seam. 285; *Hartung v. Pepper*, 11 Pick. 41.)

In *Steel v. Flagg* (5 Barn. & Ald. 342), a parcel of cashier's notes were delivered to a carrier, to be carried by a mail coach, and were sent by a different coach and were lost; notice had been given to the carrier, of which the owner was cognizant that he would not be answerable for the value of any article to an amount exceeding five pounds, unless it was insured, and the evidence tended to show that the owner had concealed the nature and value of the package, and it was claimed that the concealment was a fraud upon the carrier, and avoided his contract.

But the court held the carrier liable, and BAILEY, J. said: "If this defendant had sent the parcel by the mail, in pursuance of his contract, I should have been of opinion that under the circumstances of the case, he would not have been liable for the loss, but having sent it by a different mode of conveyance, I am of opinion that he is liable."

This case is distinguished from the previous case of *Bateson v. Donovan* (4 B. & A. 20), on the ground that in this case the carrier acted in direct contravention of his contract. (*Jones on Bailments*, 28.)

In *Coleman v. New York Central Railroad Company* (33 N. Y. 610), the defendant received goods at Little Falls, destined to New York "via People's Line," Albany, and agreed to deliver them to that line at the latter place. The line would not take them, and they were shipped by the defendant on a barge, and the barge and the goods were lost. The defendant was held to be liable, and PORTER, J., said: "When forwarding agents send goods in a mode prohibited by the owner, they do it at their own risk, and incur the liability of an insurer."

The same rule applies in case of deviation of a ship on the voyage, and is stated by STORY as follows: "If the owner deviate from the voyage, he is responsible for all loss, even from unavertable casualty; for, under such circumstances, the loss is traced back through all the intermediate causes to the first departure from duty." (*Story on Bailments*, § 509.)

If it could be shown, in such a case, that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier. (*Davis v. Garrett*, 6 Bing. 716; *Danseth v. Wade*, *supra*; *Story on Bailments*, *supra*; *Abbott on Shipping*, 362.)

The defendant in this case relied for its defence upon the contract made with the Jeffersonville Railroad Company, and must be held to affirm all its provisions.

The goods in question were, by the contract, to be sent to New York by the Pennsylvania railroad, as indicated by the letters "P. R. R." There could not have been a literal performance of the contract to send them by "all rail." It was necessary to carry them across the Ohio river at Louisville before they could be taken upon the cars of the Jeffersonville Railroad Company, and they could not reach New York without crossing the Hudson river at Jersey City.

But the contract is to have a reasonable construction, and the necessity of crossing ferries in the course of the transportation must have been known to the parties, and this water carriage from necessity must be deemed to have been authorized. The contract to carry by rail would have been substantially performed by the transportation by rail so far as was practicable.

The defendant was a carrier from Philadelphia to New York, by rail to South Amboy, and thence twenty miles to New York by water. It is found by the court that this distance by water was a part of the regular line traversed by the defendant in the prosecution of its business.

It appears in the evidence that there are several routes of carriage between Philadelphia and New York, and we think the court can take judicial notice of the existence of established railroad routes generally known and used.

The carrying of the goods by water from South Amboy to New York was not a necessity. The defendant, it is true, by its line could not have sent them otherwise; but upon seeing the direction in the bill of lading, it could have declined the service, together with the advantage which it might derive from performing it.

Having undertaken to carry the goods in violation of the instructions in the contract, it lost the benefit of the exception from liability.

This violation of duty brought the goods within reach of the peril which destroyed them, and the defendant is liable for the loss. The judgment should be reversed and a new trial granted.

MANHATTAN OIL CO. *v.* CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION CO.

COMMISSION OF APPEALS, NEW YORK, 1873.

[54 N. Y. 197.]

GRAY, C. The oil destroyed by fire, the value of which is the subject of the present controversy, was received by the Union Transportation and Insurance Company, at Cincinnati, to be transported by that Company to New York at a stated price for the entire route, and upon certain conditions, one of which was, that the company should not be liable for damages or loss by fire, or other casualty which should occur to

the oil while in depots or in places of transshipment. Under this contract that company would doubtless have been liable had the oil been damaged or destroyed while on the defendant's road or boat, by any of the perils hazarded by common carriers not excepted in the contract for its transportation; and it is equally clear that if the action had been brought against that company to recover the value of the oil, it would have been shielded by the exception in the bill of lading. (*Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514, 519.) This proposition I do not understand to be questioned; not because the Union company, who became responsible for the safe delivery of the oil in New York provided against its liability for damage to, or the loss of, the property by fire in the places specified, did not as it did in some other respects, make provisions for the exemption of connecting lines. The plaintiff insists that the defendant, who was the last carrier on the route to New York, to which the Union company had agreed to transport it, is not entitled to the benefit of the condition referred to, upon which the Union company agreed to carry it to that city. The contract made by the Union company was for a service to be performed, not only for a compensation to which it would not have been entitled until the property had been transported to, and ready for delivery in New York, but by it that the company would have incurred a liability for damage to, or a loss of it, had not the loss occurred in a depot or place of transshipment. The contract having been made by that company for the transportation of the oil from Cincinnati to New York was, including the condition referred to, commensurate with the undertaking to transport it over the whole and every part of the route. Had it been a contract which did not carry the liability of the first carrier beyond the distance traversed by its cars, the condition could not avail the defendant; but as it is, the defendant, instead of being the party who contracted with the plaintiff, was aiding the first carrier in performing its contract, and for a compensation to be equably apportioned and paid by that carrier, to whom the defendant was but a subordinate, and shielded by the condition made by that company against a liability for loss by fire. (*Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514, 521.) A point was made upon the argument that the bill of lading was not made simultaneously with the shipping of the oil, but two days subsequent, and hence that it does not afford an inference that its terms were assented to. This fact does not appear among the facts found, but otherwise, and although the evidence was to that effect, no exception appears to have been taken to the finding.

Whether or not the inference should be without some evidence to the contrary that the agreement as made was merged in the one subsequently written and received by the purchasing and shipping agent, without dissent, is not now necessary to be considered.

*KESSLER v. NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD CO.*

COMMISSION OF APPEALS, NEW YORK, 1875.

[61 N. Y. 538.]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment entered for plaintiff on the report on a referee, and granting a new trial. (Reported below, 7 Lans., 62.)

This action was brought to recover for loss of baggage. It appeared that, on September 29, 1870, the plaintiff bought a coupon ticket in the city of Washington for a passage to Buffalo over the Baltimore and Ohio Railroad, the Philadelphia, Wilmington and Baltimore Railroad, Camden and Amboy Railroad, the Jersey Transportation Company and the New York Central and Hudson River Railroad, and, at the same time, she received a check for her baggage with the names of all these roads stamped upon it. She started on that day and reached Buffalo on the next day; and, on several days thereafter, she demanded her baggage of the defendant, at Buffalo, but it was not found or delivered to her. She rode to Buffalo upon her ticket, the coupons being taken off upon the different roads. There was no proof that the baggage ever came into the possession of the defendant, and there was no proof what became of it after it was checked. There was no proof of any connection between the different railroad companies except what might be inferred from the form of the tickets and the check, except that there was proof that the roads between Washington and Buffalo sell tickets and check baggage through each way.

The baggage-master of the defendant testified that it was the custom, at the New York depot of the defendant, to keep a record of all baggage received there in a book, which he produced; and that there was no record of the baggage in question. At the close of the evidence, defendant's counsel moved that plaintiff be nonsuited, which motion was denied, and said counsel duly excepted.

EARL, C. There was no proof that the defendant and the other railroad companies were jointly engaged in the business of transporting passengers between Washington and Buffalo. The plaintiff purchased her ticket and obtained the check at the depot of the Baltimore and Ohio Railroad Company. What agency the person who sold the ticket had does not appear, and it does not appear whose agent he was. It is so improbable that all the companies between Washington and Buffalo had some arrangement by which they were jointly interested in the passenger business over all the roads that it cannot be presumed from the facts which appear in this case. The facts are consistent with either one of two theories. Either the Baltimore and Ohio Railroad Company made an entire contract to transport the plaintiff, with her

baggage, to Buffalo, employing the other companies to perform the contract over their roads; or, which is most probable, each company was the agent of the others to sell tickets and check baggage over the other roads. Upon neither theory is the defendant liable in this case. Upon the first theory, the Baltimore and Ohio Railroad Company would be the only company liable upon the contract, and certainly neither of the companies could be made liable for the loss or destruction of the baggage without proof that it came into its possession. Upon the second theory, the agency would be to bind each of the other companies to transport the passenger and baggage over its road, and each road would alone be responsible for the safety of the passengers and baggage upon its road. It is true that the baggage was checked through to Buffalo. While there was but one check with the names of all the railroads upon it, it is the same as if there had been a separate check upon the baggage for each road; and the responsibility of neither road commenced until it received the baggage.

These views are fully sustained by the opinion of CHURCH, Ch. J., in the case of *Milnor v. N. Y. and N. H. R. R. Co.* (53 N. Y., 363). In that case, defendant's road ran between New York and New Haven, Connecticut. It connected at Bridgeport, Connecticut, with the Housatonic Railroad, operated by the Housatonic Railroad Company, between Bridgeport and Pittsfield, Massachusetts, passing through Sheffield. It was proved that, for mutual convenience of passengers and of the companies, and by agreement between the defendant and the Housatonic Company, the defendant sold tickets through from New York to Sheffield at the rate of three dollars and sixty cents per ticket, out of which defendant deducted its share, one dollar and seventy cents, and paid the balance to the Housatonic Company; and that, under this arrangement, a coupon ticket to Sheffield, from New York, was sold to plaintiff's assignor by the defendant; and that the baggage of plaintiff's assignor was checked with a Housatonic check, and was safely carried over defendant's road, but was destroyed by fire after reaching Sheffield. It was held that the defendant was not liable, but that the Housatonic Railroad Company was. According to the law of that case, if this action had been brought against the Baltimore and Ohio Railroad Company, which sold the ticket and checked the baggage, it would have escaped liability by showing that the baggage was lost after it had been carried over its road. The law of that case clearly is, that in such a case that company is alone liable upon whose road the baggage is lost or destroyed. The questions applicable to this case are there so fully discussed, and prior authorities so fully cited and criticised, that a further citation of authorities or discussion of the principles involved are unnecessary.

I do not know of any ground upon which we can indulge in the presumption that this baggage ever came into the possession of the defendant. There is no proof showing what became of it after it was checked at Washington. If the defendant was required to prove a

negative — that it did not receive the baggage — it did it in the only way ordinarily practicable, by proof that it kept a record of all baggage received in New York, and that it had no record of the receipt of this baggage.

The order of the General Term must be affirmed, and judgment absolute ordered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

MOORE v. NEW YORK, NEW HAVEN, AND HARTFORD
RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1899.

[173 Mass. 335].

HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a passage from Charleston, Tennessee, to Boston. The passage was over six connecting railroads; it does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called presumption was started and justified as a true presumption of fact, that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies upon a license to show it. 1 Greenl. Ev. § 79. Pub. Sts. c. 214, § 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption, (*Farmington Mercantile Co. v. Chicago, Burlington, & Quincy Railroad*, 166 Mass. 154,) it is almost necessary to call on the last carrier to explain the loss if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists. *Smith v. New York Central Railroad*, 43 Barb. 225, 228, 229; *S. C.* affirmed, 41 N. Y. 620. *Laughlin v. Chicago & Northwestern Railway*, 28 Wis. 204. *Memphis & Charleston Railroad v. Holloway*, 9 Baxter, 188, 191. *Dixon v. Richmond & Danville Railroad*, 74 N. C. 538. *Leo v. St. Paul, Minneapolis, & Manitoba Railway*, 30 Minn. 438. *Montgomery & Eufaula Railway v. Culver*, 75 Ala. 587, 593. *Beard v. Illinois Central Railway*, 79 Iowa, 518. *Savannah, Florida, & Western Railway v. Harris*, 26 Fla. 148. *Faison v. Alabama & Vicksburg Railway*, 69

Miss. 569. *Forrester v. Georgia Railroad & Banking Co.* 92 Ga. 699. In the opinion of the court, the weight of argument and authority is on that side. Mr. Justice Lathrop and I have not been able to free our minds from doubt because we are not fully satisfied that the court has not committed itself to a different doctrine. Still, it has not dealt with it in terms. In *Darling v. Boston & Worcester Railroad*, 11 Allen, 295, the only question discussed was a question of contract. In *Swetland v. Boston & Albany Railroad*, 102 Mass. 276, the question was as to frozen apples. It appeared that the weather had been very cold before delivery to the defendant. The presumption was not mentioned. These are the two nearest cases. *Judgment for the plaintiff.*

GALVESTON, HARRISBURG & SAN ANTONIO RAIL-
WAY *v.* WALLACE.

SUPREME COURT OF THE UNITED STATES, 1912.

[223 U. S. 481.]

MR. JUSTICE LAMAR delivered the opinion of the court.

In both these cases the plaintiff in error was held liable as "initial carrier" for failure to deliver mohair shipped from points in Texas to the consignee in Lowell, Mass. The company denied liability on the ground that under the contract expressed in the bills of lading its obligation and liability ceased when it duly and safely delivered the goods to the next carrier. It excepts to various rulings of the trial court by which it was prevented from proving that it had fully complied with its contract; had duly delivered the mohair, at Galveston, to the first connecting carrier, which delivered it, at New York, to the next carrier, which, in turn, delivered it to the Boston & Maine Railroad. Neither the pleadings nor proof showed what this company did with the mohair nor the cause of its non-delivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification. This contention, however, was found against the carrier, and it was held liable to the plaintiffs. 117 S. W. Rep. 169, 170.

The question as to the constitutionality of the Carmack amendment, though ably and elaborately argued, is out of the case, having been decided adversely to the contention of the plaintiff in *Atlantic Coast Line R. R. v. Riverside Mills*, 219 U. S. 186, after the present suit was instituted.

The company, however, seeks to distinguish this from that on the ground that in the *Riverside Case* it was admitted that the damage to

the freight was caused by the negligence of the connecting carrier. And, as the statute applies to cases where the damage is *caused* by the initial or connecting carrier, and as the cause of the loss of the goods does not appear here, it is argued that liability is to be governed by the contract, which provides that the initial carrier should not be responsible beyond its own line. Plaintiff in error insists that the Carmack amendment did not make it an insurer. Under the construction given that statute in *Matter of Released Rates*, 13 I. C. C. Rep. 550; *Patterson v. Adams Express Co.*, 205 Mass. 254; *Travis v. Wells-Fargo Express Co.*, 74 Atl. Rep. 444, it claims that the initial carrier is not deprived of its right to contract with the shipper against liability for damages not caused by either carrier's negligence. But the failure to plead and to prove the cause of the non-delivery of the goods at destination precludes any determination of such questions.

Under the Carmack amendment, as already construed in the *Riverside Mills Case*, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is

Affirmed.

CHAPTER VIII.

CHARGES AND LIENS.

SECTION I. FREIGHT AND OTHER CHARGES.

BASTARD v. BASTARD.

KING'S BENCH, 1679.

[2 Shower, 81.]

CASE against the defendant as a common carrier, for a box delivered to him to be carried to B., and lost by negligence.

Williams moved in arrest of judgment, because there was no particular sum mentioned to be paid or promised for hire, but only *pro mercede rationabili*.

RESOLVED well enough, and judgment given for the plaintiff; for perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire, and he is therefore chargeable for the loss of the goods in the one case as the other.²

ASHMOLE v. WAINWRIGHT.

QUEEN'S BENCH, 1842.

[2 Q. B. 837.]

LORD DENMAN, C. J.² As is very commonly the case, each party has taken pains to put himself in the wrong. After carriage of the goods without express bargain, the owner, the plaintiff, says that the carriers, the defendants, were to carry them for nothing; and he demands the goods: the defendants claim what must now be taken to be a very exorbitant charge, and refuse to deliver the goods except on payment of 5*l.* 5*s.*: the plaintiff says, I will pay it under protest that I

¹ Compare: *Harvey v. Grand Trunk Co.*, 2 Hask. 124; *Louisville Co. v. Wilson*, 119 Ind. 352; *Kellerman v. Kansas City Co.*, 136 Mo. 177; *Cleveland Co. v. Furnace Co.*, 37 Oh. St. 321. — ED.

² Only this opinion is given. PATTERSON and COLERIDGE, J. J., delivered concurring opinions. — ED.

do not owe you so much. The jury find that the proper sum is 1*l.* 10*s.* 6*d.* To the extent of the difference the defendants have received the plaintiff's money; is there any thing in the circumstances to deprive him of his remedy as for money received by them to his use? It is said that he ought to have tendered the proper charges: the answer is, that they ought to have told him the proper charges. I can see no other circumstance to deprive the plaintiff of his action in this form: the cases relied on for the defendants are all distinguishable; the utmost extent to which they go is that the action does not lie where there is another adequate remedy; and, as to equity, when the defendants had received such notice as they did, both from the attorney and from the language of the particulars, it was their duty to pay back the sums which they had no right to retain.

WESTERN TRANSPORTATION CO. *v.* HOYT.

COURT OF APPEALS, NEW YORK, 1877.

[69 N. Y. 230.¹]

CHURCH, C. J. The decision in the case of the present plaintiff against Barber, 56 N. Y. 544, disposes of some of the questions involved in this case. That was an action for conversion against the warehouseman for delivering the oats to the defendants, and it was there held that the proper construction of the bill of lading was to give the defendants, who were consignees, three full week days to discharge the cargo, and such reasonable time after that period as the circumstances might require, upon paying the specified demurrage, but that the carrier might terminate this additional privilege or right by a proper notice. It appears in this, as in that case, that notice of the arrival of the boat "Clio" was given to the consignees on Friday, at ten minutes past twelve, and it was not disputed on the trial that when the notice is after twelve o'clock, that day is not to be counted as any part of the three days given absolutely for the discharge of the cargo, and it appeared, and seems not to have been disputed, that the three days would not expire until Tuesday night at twelve o'clock. We held that the act of the carrier in removing his boat, and storing the grain elsewhere, on Tuesday, prior to the expiration of the three days, was wrongful, and amounted to a conversion, and deprived him of his lien for freight. The case was not materially changed in this respect upon the trial of this action. The notice which was claimed to have been given was given on Tuesday morning, to the effect that unless the cargo was discharged on that day the oats would be stored. Such a notice would not relieve the plaintiff from the consequences of his wrongful act in storing the oats, for the reason that the day extended,

¹ Only opinion is printed. — ED.

as was proved, to midnight, and the plaintiff violated the notice by removing the boat several hours previously. He could not by a notice shorten the time fixed by the contract itself. The construction of the bill of lading, the character of the act of the plaintiff in storing the oats, and the effect of the act upon its rights to a lien for freight must be regarded as adjudged and settled in the case referred to.

Other questions are presented upon this appeal which must be considered. About 5,000 of the 14,000 bushels of the oats were removed from the boat by the elevator procured by the defendants, and the remainder were stored in Barber's warehouse. Subsequently the defendants demanded and obtained possession of the oats from Barber upon giving him indemnity against any claim of plaintiff for freight or for the oats. It is urged that the defendants taking possession of the property entitled the plaintiff to the freight. There is some apparent plausibility in equity in this position, but it must be observed that a delivery to the consignees is as much a part of the contract as the transportation. Mr. Angell, in his work on carriers, says: "It is not enough that the goods be carried in safety to the place of delivery, but the carrier must, and without any demand upon him, deliver, and he is not entitled to freight until the contract for a complete delivery is performed." § 282. When the responsibility has begun, it continues until there has been a due delivery by the carrier. *Id.*, note 1, and cases cited. Parsons on Shipping, 220. And in this case, the bill of lading expressly requires the property to be transported and delivered to the consignees. The delivery was as essential to performance as transportation to New York, and it is a substantial part of the contract. The plaintiff might as well, in a legal view, have stopped at Albany, or any other intermediate port, and stored the grain, as to have stored it in Brooklyn. In either case he could not aver a full performance, nor that he was prevented by the defendants from performing. It follows that he cannot recover upon the contract. Performance is a condition precedent to a recovery. As said by Lord Ellenborough in *Liddard v. Lopes*, 10 East, 526, "The parties have entered into a special contract by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract, and that event has not taken place, there has been no such delivery, and consequently the plaintiff is not entitled to recover."

As the plaintiff cannot recover under the contract, if he has any claim for freight it is only for *pro rata* freight, which is sometimes allowed, when the transportation has been interrupted or prevented by stress of weather or other cause. In such a case, if the freighter or his consignee is willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service is rendered, a proportionate amount of freight will be due as "freight *pro rata itineris*." This principle was derived from the marine law, and it is said that the common law presumes a promise to that effect as being made by the party who consents to accept his goods at a place short of the port of destination, for he obtains his property with the

advantage of the carriage thus far. The principle is based upon the idea of a new contract, and not upon the right to recover upon the original contract. The application of this principle has been considerably modified by the courts. In the early case of *Luke v. Lyde*, 2 Burr. 889, a contract was inferred from the fact of acceptance, and the rule was enunciated without qualification that from such fact, without regard to the circumstances, and whether the acceptance was voluntary or from necessity, a new contract to pay *pro rata* freight might be inferred. Some later English cases, and the earlier American cases, apparently followed this rule; but the rule has been in both countries materially modified, and it is now held that taking possession from necessity to save the property from destruction, or in consequence of the wrongful act of the freighter, as in *Hunter v. Prinsey*, 10 East, 394, and in 13 M. & Wels. 229, where the master caused the goods to be sold, or when the carrier refuses to complete the performance of his contract, the carrier is not entitled to any freight. Parke, B., in the last case stated the rule with approval, that to justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with; and Lord Ellenborough, in *Hunter v. Prinsey*, *supra*, said: "The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession."

Thompson, C. J., in 15 Jr. 12, said: "If the ship-owner will not or cannot carry on the cargo, the freighter is entitled to receive his goods without paying freight." It is unnecessary to review the authorities. The subject is considered in Angell on Carriers, § 402 to 409, and Abbott on Shipping, 5th Am. ed. 547, and in the notes and numerous cases referred to, and the rule as above stated seems to have been generally adopted by nearly all the recent decisions, and its manifest justice commends itself to our judgment. In this case no inference of a promise to pay *pro rata* or any freight can be drawn. The circumstances strongly repel any such intention. The carrier doubtless acted in accordance with what it believed to be its legal rights, but the act of storing was a refusal to deliver, and as we held in the Barber case, *supra*, a wrongful act amounting to conversion, quite equal in effect to the sale of the goods in the cases cited. The carrier must therefore be regarded as refusing to deliver the oats. Neither the owner nor his consignee intended to waive a full performance or to assume voluntarily to relieve the plaintiff from non-performance. They claimed the possession of the property and the right to possession discharged from all claim for freight, and indemnified the warehouseman against such claim. Every circumstance repels the idea of a promise to pay *pro rata* freight. The case stands, therefore, unembarrassed by the circumstance that the consignee took possession of the property under the circumstances, and it presents the ordinary case of an action on

contract where the party seeking to enforce it has not shown a full performance.

The next question is, whether the plaintiff is entitled to freight upon the 5,000 bushels delivered. The contract for freight is an entirety, and this applies as well to a delivery of the whole quantity of goods as to a delivery at all, or as to a full transportation. Parsons on Shipping, 204. There are cases where this rule as to quantity has been qualified, but they have, I think, no application to the present case. The delivery of the 5,000 bushels was made with the understanding and expectation that the whole quantity was to be delivered, and no inference can be drawn of an intention to pay freight in part without a delivery of the whole. The quantity delivered must be regarded as having been received subject to the delivery of the whole cargo. There was no waiver. The principle involved is analogous to a part delivery from time to time of personal property sold and required to be delivered. If the whole is not delivered, no recovery can be had for that portion delivered. 18 Wend. 187; 13 J. R. 94; 24 N. Y. 317.

The claim for lake and Buffalo charges stands, I think, upon a different footing. These are stated in the bill of lading at 5 $\frac{3}{4}$ cents a bushel, amounting to \$842.38. It must be presumed, as the case appears, that the plaintiff advanced these charges, and if so it became subrogated to the rights of the antecedent carrier. The claim for these charges was complete when the plaintiff received the property to transport, and was not merged in the condition requiring the performance of the contract by the plaintiff to transport the property from Buffalo. That contract was independent of this claim. The bill of lading is for transportation and delivery upon payment of freight and charges: but if the plaintiff had a right to demand any part of the charges independent of the bill of lading, that instrument would not deprive him of such right. We have been referred to no authority making a liability upon such an advance dependent upon the performance of the contract for subsequent carriage. If the action had been by the lake carrier to recover for the freight to Buffalo, it is very clear that the defendants could not have interposed as a defence that the carrier from Buffalo had not performed, and why is not the plaintiff entitled to the same rights in respect to this claim as the former carrier?

I am unable to answer this question satisfactorily as the case now appears.

If these views are correct, a nonsuit was improper, and there must be a new trial with costs to abide event.

All concur, except ALLEN, J., taking no part, and ANDREWS, J., absent.

*Judgment reversed.*¹

¹ Compare: R. R. v. Saunders, 128 Mass. 53; Hurten v. Insurance Co., 1 Wash. C. C. 530; Escopinche v. Stewart, 2 Conn. 262; Thibault v. Russell, 5 Harr. 293; Stevens v. Stewart, 69 Mass. 108; Minnesota Co. v. Chapman, 2 Ohio St. 207. — Ed.

ALLANWILDE TRANSPORT CORPORATION v.
VACUUM OIL COMPANY.

SUPREME COURT OF THE UNITED STATES, 1919.

[248 U. S. 377.]

McKENNA, J. The questions in the cases arise upon libels filed against the "Allanwilde" to recover prepaid freight for the transportation of certain goods and merchandise to designated ports in Europe.

The solution of the questions turns upon (1) the asserted prevention of the adventure by a storm at sea which the vessel encountered, requiring her return to port for repairs, and (2) afterwards by the restraining power of the Government.

On November 1, 1917, the Allanwilde, owned by the Allanwilde Transport Corporation, was seized upon libels filed by the Vacuum Oil Company and A. W. Pidwell respectively, each of which had shipped certain goods to be carried from New York to Rochefort, France.

In May, 1917, the Oil Company chartered the vessel to carry a cargo of oil in barrels at the rate of \$16.50 a barrel (changed afterwards to \$15.25).

The charter party contained, *inter alia*, the following provisions:

" . . . freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

On August 25, the oil having been loaded, the vessel issued a bill of lading containing, *inter alia*, the following provision: "All conditions and exceptions of charter-party are to be considered as embodied in this bill of lading."

Pidwell was permitted to ship certain kegs of nails on the vessel, and on August 15 a bill of lading was issued to him. *Inter alia*, it provided that the carrier should not be liable for loss, damage, delay or default "by causes beyond the carrier's reasonable control; . . . by arrest or restraint of governments, princes, rulers, or peoples; . . . by prolongation of the voyage: . . ."

It is provided in paragraph 5 of the bill of lading that "full freight to destination, whether intended to be prepaid or collect at destination, and all advance charges . . . are due and payable to (the Allanwilde Transport Corporation) upon receipt of the goods by the latter; . . . and any payments made . . . in respect of the goods . . . shall be deemed fully earned and due and payable to the carrier at any

stage before or after loading of the service hereunder without deduction (if unpaid), or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up; . . ."

In pursuance of the contracts thus attested the oil and the nails were shipped on the Allanwilde and the freight was paid in advance — \$49,745.50 for the oil and \$3,128.00 for the nails.

The vessel was seaworthy and properly manned and equipped, and set sail September 11. After she had been out about fourteen days and was about 500 miles from New York, she encountered a storm so severe that her boats were carried away and she sprang a leak so threatening that the water in her hold was three or four feet deep and was gaining on the pumps. Thereupon the master properly decided that he must seek a port of refuge for safety and repair. Halifax was about 500 miles away, but in that direction the wind was against him, while it was favorable for New York, and on this account as well as for other good reasons he headed for New York, where he arrived on October 5, having been out twenty-four days. Repairs were undertaken at once, the cargo remaining on board meanwhile.

"On September 28, while the vessel was at sea, the government decided to refuse clearance thereafter to any sailing vessel bound for the war zone. . . . The master did not know of this decision until the vessel returned to New York; he received no information from the shore after September 11. The repairs being finished, the vessel attempted to resume her voyage, but clearance was refused, and none could be obtained in spite of her efforts to induce the government to modify its stand. Toward the end of October the shippers were notified by the carrier to unload their goods, and this they did, but under protest and reserving their rights. Afterwards, the oil was forwarded by steamship, but at a higher rate of freight and under other charges. What became of the nails after they were unloaded, does not appear. The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight, but also damages for failure to carry. On each libel the District Court entered a decree for the prepaid freight alone, refusing recovery for the other damages."

Upon these facts the Circuit Court of Appeals have certified four questions, two in each libel, as follows:

"1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the Oil Company dissolved, so as to relieve the carrier from further obligation to carry the oil?

"2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

"3. Was the adventure frustrated, and was the contract evidenced

by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

"4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

A copy of the charter party and copies of the bills of lading are attached to the certificate and also the official bulletin refusing clearance to "sailing vessels destined to proceed through the war zone."

The argument of counsel upon the elements of the questions is quite extensive, ranging through all of the ways in which contracts can be dissolved or their performance excused by the agreement of the parties or prevented by some supervening cause independent of the parties and dominating their convention. We do not think it is necessary to follow the argument through that range. It may be brought to the narrower compass of the charter party and the bills of lading.

The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that "freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost." And it is provided that this provision is, with other provisions, "to be embodied" in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is — "Freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost." The provision was not idle or accidental. It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the non-carriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation. It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting "restraint of princes, rulers and peoples" and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of

its imposition — that is, the submarine menace — and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The Kronprinzessin Cecilie, 244 U. S. 12.

There is no imputation of bad faith. The carrier demonstrated an appreciation of its obligations and undertook their discharge. It was stopped, first by storm, and then prevented by the interdiction of the Government. In neither situation was it inactive. It quickly repaired the effects of the former and protested against the latter, joining with the shipper in an earnest effort for its relaxation. It gave up only when the impediment was found to be insurmountable.

The answer to the other contention is that the contract regarded the Allanwilde, a sailing ship, not some other kind of ship or means. The Tornado, 108 U. S. 342; The Kronprinzessin Cecilie, *supra*.

The bill of lading in No. 450 is even more circumstantial. It provided that "Full freight to destination, whether intended to be prepaid or collect at destination. . . . shall be deemed fully earned and due and payable to the *carrier* at any stage before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up." And there is exemption from liability "for any loss, damage, delay or default, . . . by arrest or restraint of governments, princes, rulers, or peoples; . . ."

The questions certified are therefore answered in the affirmative.

So ordered.

BURLINGTON AND MISSOURI RIVER RAILROAD CO. *v.*
CHICAGO LUMBER CO.

SUPREME COURT OF NEBRASKA, 1884.

[15 *Neb.* 390.]

REESE, J. This is an action in garnishment commenced in the District Court of Otoe county by the defendant in error, a judgment creditor of one William W. Babbitt, against the plaintiff in error, as a supposed debtor of the said Babbitt.

The answer of the plaintiff in error discloses the fact that at the time of the service of the summons in garnishment it was indebted to the said Babbitt in the sum of \$144.51 for overcharges, before that time made, on freight. Said answer discloses the further fact that it had in its possession at said time one hundred and fifty-three tons and fourteen hundred pounds of coal (eleven carloads) consigned to the said Babbitt, and worth, as it alleges, four dollars per ton, amounting to \$616.10; but it further alleges that its charges against said coal amount to the sum of \$1,029.63, which it itemizes as follows: Freight and back charges, \$666.63; demurrage, eighty-five days in car, \$330; unloading coal, \$33; being \$413.52 more than the alleged value of the coal. The plaintiff in error therefore insists it was not indebted to said Babbitt in any amount.

It is shown by the evidence in the trial of the cause that at the time of the unloading of the coal by the plaintiff in error, it converted it to its own use, unloading it into its own bins.

The finding of the District Court was in accordance with the above facts, and judgment was rendered against the plaintiff in error, and in favor of the defendant in error, for the said sum of \$144.51. Both parties excepted to the ruling of the court, but the plaintiff in error, only, brings the case into this court by petition in error, alleging that the court erred in rendering judgment against it, for the reason that the judgment is contrary to law, and contrary to and inconsistent with the findings of fact by the court; also in not discharging the plaintiff in error without liability as garnishee.

According to our view of the case, it will not be necessary to examine the alleged errors separately, as we can best present our conclusions by grouping all together. But before doing so it is proper to note the fact that the defendant in error in the course of the trial offered testimony to prove that the coal was worth \$8 per ton instead of \$4 as claimed by plaintiff in error, but upon objection by plaintiff the offer was overruled by the court and the evidence excluded. This ruling must have been made upon the theory that the whole matter of the eleven carloads of coal should be left out of the question, and the findings of the court upon that subject were not intended in any respect as a basis for the judgment. In this we think the District Court was correct, at least if

the court did err it was against the defendant in error and not the plaintiff.

The plaintiff in error concedes in its brief that the freight charges were more than the value of the coal, but seeks to explain that fact by saying "the coal was wrongfully turned in transit from its proper course; it should have come over the Council Bluffs and St. Joe Railroad, and it was turned and went the roundabout way, meeting with several washouts which caused the freight to be more than the coal." This explanation we think will hardly meet the case. We know of no rule of law which will permit railroad companies, as common carriers, to "wrongfully" send freight by a "roundabout" way, instead of over its direct lines, and thus increase the cost of transportation. While this course might be instrumental in increasing the revenues of the carrier, it would be very injurious to the commerce of the country, which requires not only cheap but direct and rapid transportation.

To these charges for freight was added another burdensome charge, that of demurrage. It is claimed by the plaintiff that this freight was allowed to stand in its cars in all eighty-five days, *i. e.* equivalent to one car that number of days, and for this it charges \$330. It is not claimed that this charge was made by virtue of any contract between the shipper and the carrier, nor yet by any statutory enactment permitting it, or by any use or custom which may possibly have acquired the force of law. And we are unable to see how any such charge can be insisted upon in this action. We know of no authority for it, and our attention has been called to none.

In *Chicago & North Western Ry. Co. v. Jenkins*, 103 Ill. 588, it is decided that the right to demurrage does not attach to carriers by railroads. If it exists at all, as a legal right, it exists only as to carriers by sea-going vessels, and is confined to maritime law. As to whether demurrage might be charged in case of a contract to that effect we express no opinion, but that it cannot be allowed in this case we have no doubt.

The charge of \$33 for unloading the coal is equally objectionable. The proof shows that the plaintiff in error unloaded the coal into its own bins for its own use. There is no claim that it cost any more to unload this coal than it would had it belonged to the plaintiff in error in the first instance. Why should it charge for doing with this coal the same as it would have had to do with its own? We can see no reason for such charge, and it should not be allowed.

From the foregoing we are led to the conclusion that the District Court did not err, as against the plaintiff in error in the judgment rendered; that if its judgment was erroneous the defendant in error is the only sufferer thereby, but as it is not seeking any relief at the hands of this court the judgment of the District Court must be affirmed.

The other judges concur.¹

Judgment affirmed.

¹ Compare: *Crommelin v. R. R.*, 4 Keyes, 190; *Hunt v. Haskell*, 24 Me. 339; *Miller v. Mansfield*, 112 Mass. 260; *Clendanill v. Tuckerman*, 17 Barb. 184; *Beckwith v. Frisbie*, 32 Vt. 559. — ED.

WOOSTER v. TARR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1864.

[8 *Alt.* 270.]

CONTRACT to recover for the carriage of mackerel from Halifax to Boston.

It was agreed in the superior court that the defendants shipped the mackerel at Halifax, upon a vessel of which the plaintiffs were part owners, said Wooster being master, under a bill of lading in the usual form, to be delivered at Boston "unto Messrs. R. A. Howes & Co. or to their assigns, he or they paying freight for said goods," &c. On the arrival of the vessel at Boston, Wooster was informed by Howes & Co. that the mackerel had been sold "to arrive," to a person to whom they requested him to deliver them. The mackerel were accordingly delivered, and payment demanded of Howes & Co., but refused. Howes & Co. were then and still are insolvent. The mackerel, at the time of their delivery on board the vessel, had been purchased and paid for by the defendants for and on account of Howes & Co., at whose risk they were after shipment; but this fact was unknown to the plaintiffs. The mackerel were entered at the custom-house in Halifax in the name of the defendants.

Upon these facts judgment was rendered for the plaintiffs, and the defendants appealed to this court.

BIGELOW, C. J. The question raised in this case is very fully discussed in *Blanchard v. Page*, 8 Gray, 281, 286, 290-295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the ship-owner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The *dictum* of Bayley, J., in *Moorsom v. Kymer*, 2 M. & S. 318, subsequently repeated by Lord Tenterden in *Drew v. Bird*, Mood. & Malk. 156, that in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. *Sanders v. Van Zeller*, 4 Q. B. 260, 284. *MacLachlan on Shipping*, 426.

It is contended, on the part of the defendants, that the omission of the master to collect the freight of the consignees of the cargo or their assigns, under the circumstances stated, was a breach of good faith

towards the shippers, which operates as an estoppel on him and the other owners of the vessel, whose agent he was, to demand the freight money of the defendants. But there are no facts on which to found an allegation of bad faith against the master. He did no act contrary to his contract or inconsistent with his duty towards the shippers. It is true that he omitted to enforce his lien on the cargo for the freight, by delivering it without insisting on payment thereof by the consignees. This was no violation of any obligation which he had assumed towards the defendants as shippers of the cargo. A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading, that the cargo is to be delivered to the person named or his assignees, "he or they paying freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. *Shepard v. De Bernales*, 13 East, 565. *Domett v. Beekford*, 5 B. & Ad. 521, 525. *Christy v. Row*, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.

Judgment for the plaintiffs.

DAVISON v. CITY BANK.

COMMISSION OF APPEALS, NEW YORK, 1874.

[57 N. Y. 81.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of plaintiffs, entered upon an order denying motion for new trial, and directing judgment on verdict.

This action was brought to recover a balance alleged to be due for freight upon a cargo of wheat carried on plaintiffs' schooner, from Milwaukee to Oswego.

In the bill of lading, Mower, Church & Co. were named as consignors, the property "to be delivered in good order and condition as addressed on the margin, or his or their assignees or consignees, upon paying the freight and charges as noted." In the margin of the bill, was the following entry: "Acct. T. L. Baker, to City Bank, Oswego, N. Y." The wheat was carried to Oswego. The captain of the vessel

called at the City Bank, and was first verbally directed to deliver the wheat to the Corn Exchange Elevator, and, afterward, the cashier of the bank indorsed on the back of the bill of lading the following :

“ Deliver to the Corn Exchange Elevator, for account of the Milwaukee National Bank, subject to the order of the City Bank.

“ Oswego, *October 9, 1869.*

“ D. MANNERING,

“ *Cashier.*”

The captain delivered the wheat in accordance with this direction to the Corn Exchange Elevator, which was owned by A. F. Smith & Co. Smith & Co. gave the captain receipts for the wheat, paid part of the freight, and gave their check for the balance on the Fourth National Bank of New York. There was no agreement that the check should be taken in payment of the freight. It was sent forward to New York, presented for payment, and payment refused. The drawers were duly notified of the dishonor of the check, and payment of the freight demanded and refused.

It was proved on the trial, under the objection of the plaintiffs' counsel, that the wheat was purchased in Milwaukee by Mower, Church & Bell, for A. F. Smith & Co. The money was advanced by the Milwaukee National Bank, to whom drafts therefor were delivered, drawn on A. F. Smith & Co., which were annexed to copies of the bills of lading, and sent forward to the City Bank to procure their acceptance. J. S. Baker, named in the bill of lading, was cashier of the Milwaukee National Bank. The wheat was sent to defendant, in order to secure the payment of the drafts. Defendant had no pecuniary interest in either the wheat or the drafts. Smith & Co. sold the wheat and appropriated the avails, leaving the drafts unpaid. Neither masters nor owners had any knowledge or notice of the manner the wheat was purchased, or of the drawing or the payment of the drafts.

A verdict was directed for the plaintiffs, for the balance of freight unpaid, which was rendered accordingly. Exceptions were ordered heard at first instance, at General Term.

EARL C. That the consignee, who receives the cargo consigned under such a bill of lading as the one in question, is liable to the carrier for the freight is not questioned. (*Meriam v. Funck*, 4 Denio, 110; *Hinsdell v. Weed*, 5 id. 172; *Davis v. Pattison*, 24 N. Y. 317; *Morse v. Pesant*, 2 Keyes, 16; *Merrick v. Gordon*, 20 N. Y. 93.) It matters not under such a bill of lading, whether the consignee be the owner or not; the law implies a promise on his part to pay the freight. But in this case, the fact that the defendant was merely the agent of the Milwaukee bank was not disclosed upon the shipping bill, and was unknown to the plaintiffs. It was found by the General Term, that “ neither the master, nor owners of the schooner, had any knowledge or notice of the manner in which the wheat was purchased, or of the drawing, or the non-payment of the draft, or of the instructions given by the Milwaukee National Bank to the defendant.” The defendant

cannot therefore claim exemption from liability to the plaintiffs on the ground that it was merely the agent of another party. The form of the bill of lading addressed "Account T. L. Baker, to the City Bank, Oswego, N. Y.," is such as to show that the defendant was the consignee. It has been so held in a number of similar cases. (*Dows v. Greene*, 16 Barb. 77; *S. C.*, 32 id. 490; *Gilson v. Madden*, 1 Lans. 172; *Hinsdell v. Weed*, 5 Denio. 172; *Canfield v. The Northern Railroad Co.*, 18 Barb. 586; *Dart v. Ensign*, 47 N. Y. 619.)

It, therefore, only remains to be examined, whether anything was done at the time of the delivery of the wheat, or subsequently thereto, by which the defendant was discharged from a liability, which would otherwise rest upon it. The bill of lading provided that the cargo was to be delivered as "addressed on the margin, or to his, or their assignees or consignees upon paying the freight," etc. If the defendant, having no interest as owner in the wheat, had simply assigned the bill of lading, and directed a delivery to the assignee, or given an order for its delivery to the owner without accepting or receiving the wheat, it would not have been liable for the freight. (*Meriam v. Funck*, 4 Denio, 110; *Dart v. Ensign*, 47 N. Y. 619; *Chitty on Carriers*, 209.) But this the defendant did not do. It accepted the wheat, by directing it to be delivered to the elevator, subject to its order. The wheat after such delivery, remained under its control, and it had all the possession it could take, or be expected to have. The defendant was not, therefore, discharged from its liability to pay the freight by the order for a delivery to the elevator.

At the time the order was given, the cashier of defendant also said to the master of the vessel that "they (meaning the proprietors of the elevator), will pay your freight." This was an assurance that they would pay the freight, which the defendant had by its acceptance of the wheat, become liable to pay. The master was not bound to look to them for the payment of his freight. He was not directed to collect his freight before he made delivery, or to insist upon payment as a condition of delivery. He had the right to make delivery and then immediately call upon the bank for his freight, and was not bound to make any efforts to collect it elsewhere. The proprietors of the elevator paid a portion of the freight and gave their checks on a New York bank for the balance. There was no agreement that these checks should be taken as payment, and they did not, therefore, for an instant, operate as payment. The master could, therefore, immediately have tendered them back, and demanded payment of the balance of the freight. They could not operate as payment, unless paid, and there is no claim that after the master received the checks, there was a want of due diligence in presenting them for payment, or in giving notice of non-payment, and there is no claim that after the receipt of the checks there was any laches on the part of the plaintiffs, which caused any damage to the drawers thereof or to the defendant. Hence, I am unable to see how the taking of the checks deprived the plaintiffs of any rights which they had against the defendant. The bank had made

the proprietors of the elevator their agents, to receive and hold the wheat for them, and also to pay the freight, and the loss following from the conduct of such agents should fall upon it rather than upon the plaintiffs.

ANONYMOUS.

[*Rol. Abr. Action Sur Case*, 24, 15.]

IF A invite B to eat and drink [in the inn of J. S.] . . . as to the host they are both liable to pay the reckoning, unless the host knew that B had been invited.¹

BIRNEY *v.* WHEATON.

SUPREME COURT, NEW YORK, 1885.

[2 *How. Pr. N. S.* 519.]

MCADAM, J. Independently of the statute of 1884 (chap. 381), enacted after the board bill herein was contracted (and on that account inapplicable to the present contention), a married woman might have contracted a board bill on her own credit and responsibility. In the present case the defendant, in order to establish his lien upon the plaintiff's property, offered to prove that the plaintiff was the head of the family, was the guest in the defendant's house, and the person who was trusted; that she had money and credit and her husband none; and all this testimony was ruled out under exception. We think the testimony was competent and ought to have been admitted. If upon such evidence the jury had found that the credit was given to the plaintiff, and not to her husband, the defendant, as a hotel-keeper, had the right to detain the plaintiff's property until the board bill was paid, and was not liable to her in the present action of claim and delivery without proof of tender of the amount due and refusal to deliver after tender made. The case of *McIlvaine v. Hilton* (7 Hun, 594) only applies where the wife is supported by the husband, and the credit is given to him.

We cannot imagine why a wife with credit cannot take her husband, who has none, to a hotel, in order to procure board and shelter for her family, arrange that she and not the impecunious husband shall pay the bills (*Maxon v. Scott*, 55 N. Y. 247; *Tiemeyer v. Turnquist*, 85 N. Y. 516). If this were not so, a wife, however wealthy, might find it difficult to find rooms in a hotel, simply because her husband was unfortunate enough to be impecunious. These observations are made simply to show that the rulings made at the trial might lead to the impracticable results suggested.

¹ *Acc. Forster v. Taylor*, 3 Camp. 49. See also *Clayton v. Butterfield*, 10 Rich. Law (S. C.) 300. — Ed.

It follows, therefore, that the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event, to the end that the proof excluded may be admitted upon the new trial, and the question of the fact whether the credit was given to the husband or wife submitted to the jury.

NEHRAS and HYATT, JJ., concurred.

GRAND TRUNK RAILWAY CO. *v.* STEVENS.

SUPREME COURT OF THE UNITED STATES, 1877.

[95 *U. S.* 655.]

BRADLEY, J.¹ It is evident that the court below regarded this case as one of carriage for hire, and not as one of gratuitous carriage, and that no sufficient evidence to go to the jury was adduced to show the contrary; and, hence, that under the ruling of this court in *Railroad Company v. Lockwood*, 17 Wall. 357, it was a case in which the defendant, as a common carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view, we think the court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transaction. The pass was a mere ticket, or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of *Lockwood's*. There the pass was what is called a "drover's pass," and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was travelling upon the conditions indorsed on the pass, or that, if he travelled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge, that, if the plaintiff was a free or gratuitous passenger, the defendant was not liable. The evidence did not sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken. . . .

¹ Part of the opinion only is given. — Ed.

The carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire.

SECTION II. LIEN.

POTTS *v.* NEW YORK AND NEW ENGLAND RAILROAD CO.

SUPREME COURT OF MASSACHUSETTS, 1881.

[131 *Mass.* 455.]

TORT for the conversion of a quantity of coal. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon an agreed statement of facts in substance as follows :

The plaintiff, a coal merchant, sold to a firm in Southbridge in this Commonwealth a large quantity of coal and shipped 205 tons thereof by a schooner to Norwich, Connecticut, to be thence transported by the defendant over its railroad to the consignees at Southbridge. The defendant received the coal at Norwich, paying the water freight to discharge the schooner's lien, amounting to \$205, and then carried the coal to Southbridge and delivered to the consignees all but 119 tons thereof, no part of the advances for water freight nor the defendant's freight being paid. On the arrival at Southbridge of the 119 tons, which is the coal in controversy, the consignees having failed, the plaintiff duly stopped it *in transitu*, and demanded it of the defendant. The defendant refused to deliver it, claiming a lien on it for the entire amount of the water freight on the whole cargo paid by the defendant, and for the whole of the defendant's freight on the cargo, amounting in all to \$513. The plaintiff tendered to the defendant \$297, which was enough to cover the water freight and the defendant's freight on the coal in question. The value of the coal in controversy was \$696.

If the defendant had no right to hold the coal as against the plaintiff for the advances and freight on the whole cargo, judgment was to be entered for the plaintiff for \$398, with interest from the date of the writ ; otherwise, judgment for the defendant.

GRAY, C. J. A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the rest without proof of an intention so to do. *Sodergren v. Flight*, cited in 6 East, 622 ; *Abbott on Shipping* (7th ed.), 377 ; *Lane v. Old Colony Railroad*, 14 Gray, 143 ; *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104.

And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. *Briggs v. Boston & Lowell Railroad*, 6 Allen, 246, 250.

The right of stoppage *in transitu* is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. *Bloxam v. Sanders*, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406; *Rowley v. Bigelow*, 12 Pick. 307, 313. This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. *Oppenheim v. Russell*, 3 B. & P. 42; *Jackson v. Nichol*, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591; see also *Butler v. Woolcott*, 2 N. R. 64; *Sears v. Wills*, 4 Allen, 212, 216. But the common-law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee.

*Judgment for the defendant.*¹

SHINGLEUR v. CANTON.

SUPREME COURT OF MISSISSIPPI, 1901.

[78 Miss. 875.]

TERRAL, J., delivered the opinion of the court.

The appellant sued the appellee in replevin for fifty-nine bales of cotton, and before suit brought demanded the delivery of the same, and offered to the warehouse company all storage and other charges thereon, amounting to \$124.55, upon said cotton. The warehouse company refused the delivery of the cotton unless appellant would pay it the storage and other charges on seventy-nine bales of cotton previously delivered by appellee to appellant, amounting to \$162.89. For some reason appellant declined to pay the charges on the previous bailments. It appeared from the evidence that a separate receipt was given for each bale of cotton, and there was no connection between the bailment of the fifty-nine bales of cotton sued for and the prior bailment of the seventy-nine bales of cotton, upon which \$162.89 was claimed as charges. A judgment was rendered against appellant for

¹ Compare: *Westfield v. Ry.*, 52 L. J. Q. B. 276; *R. R. v. Oil Works*, 126 Pa. St. 485; *Farrell v. R. R.*, 102 N. C. 390; *White v. Vann*, 6 Humph. 70. — Ed.

the expenses on the seventy-nine bales of cotton, as well as that on the fifty-nine bales sued for. In that respect, it is claimed that the court erred.

1. The contention of the appellee that a warehouse lien is a general lien and gives a right to retain for a balance of accounts relating to similar dealings is not to be maintained. It is a common-law lien, which is the creature of policy, and is a specific or particular lien, which attaches only upon each separate bailment, and is lost when all the articles of each several bailment are delivered to the bailor or his assignee.

2. The contention that a warehouseman, under § 2682, code 1892, has a lien on cotton raised in this State, for storage and other charges connected therewith, is not supported by any reasonable construction of that section.

The cotton here was not in the warehouse to prepare it for market, but was at the market, and was there for sale or shipment, and the charges claimed were incident to the handling of the cotton then in the market. It is not covered, we think, by § 2682.

3. On the delivery of each bale of cotton at the warehouse by the farmer bringing it in for sale, a receipt was given, of the following tenor:

"No. ——. Received of ——— one bale of cotton, in apparent good order. Mark, ——. No., ——. Weight, ——. Remarks, ———. ———, *Manager*.

"Responsible for loss or damage by fire or water. This bale of cotton to be delivered only on this receipt properly indorsed."

It is not denied but that appellant had bought the fifty-nine bales of cotton from the owners, and had received these unindorsed receipts as a symbolical delivery of the bales of cotton; that, as between the bailor and the assignee, the property was intended to be passed to the assignee by the delivery of the unindorsed receipts. The intention of the parties gives effect to their acts as a valid transfer of the property. *Allen v. Williams*, 12 Pick. 297; *Bank v. Dearborn*, 115 Mass. 219; *Bank v. Ross*, 9 Mo. App. 399; *Lickbarrow v. Mason*, *Smith's Ldg. Cases* (8th ed.), 1209.

However, no objection was made in the court below to the receipts because not indorsed, and the objection comes too late when made here for the first time.

The appellant, upon the case as made by the record, was entitled to recover the fifty-nine bales of cotton the charges on which had been tendered, with all costs.

*Reversed and remanded.*¹

¹ Compare: *Scott v. Jester*, 13 Ark. 446; *Naylor v. Mangles*, 1 Esp. 109; *Lenckart v. Cooper*, 3 Scott, 521; *Steel Co. v. R. R. Co.*, 94 Ga. 636; *Hartshorne v. Johnson*, 2 Halst. 108; *Bacharach v. Freight Line*, 133 Pa. St. 414. — Ed.

ROBINSON v. BAKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1849.

[5 *Cush.* 137.]

THIS was an action of replevin, for six hundred barrels of flour, tried before *Dewey, J.*, and reported by him for the consideration of the whole court. The material facts are as follows:—

The plaintiff, in October, 1847, by his agent, Joseph B. Gardner, of Buffalo, in the State of New York, purchased six hundred barrels of flour, which the agent caused to be put on board a canal-boat at Black Rock, on the 23d of October, 1847, to be transported to Albany. The boat was owned by a company, known by the name of the Old Clinton line, engaged in the business of common carriers between Buffalo and Albany. On receiving the flour, the agent of the company executed and delivered to the plaintiff's agent duplicate bills of lading, by which the company undertook to deliver the flour to Witt, the agent of the Western railroad, at East Albany. One of the bills of lading was sent to Witt, and the other to the plaintiff, at Boston.

On the arrival of the flour at Albany, November 5th, 1847, Monteath and company, the agents there of the Old Clinton line, called on Witt and informed him that the six hundred barrels of flour had arrived, and asked him if he would take it off the boat that day. Witt said he would not, without mentioning any time when he would receive the flour; but only that the boat must take its turn. Boats arriving at East Albany, consigned to Witt or to the Western railroad, were discharged in their turns; and in the months of October and November, 1847, there was a detention at East Albany, in unlading, of from one to three days.

The agents of the Old Clinton line at Albany thereupon shipped the flour to the city of New York, by a company known as the Albany and Canal line, engaged as common carriers in the transportation of merchandise between the city of New York and Albany, and received from the agents of the company \$433.08, as and for the freight of the flour from Black Rock to Albany, and requested the company to ship the flour from New York to Boston, for plaintiff.

On the arrival of the flour at New York, Hoyt, the agent of the Albany and Canal line there, shipped the same for Boston on board the schooner, *Lady Suffolk*, of which the defendant was master, consigned to Horace Scudder and company, agents of the Albany and Canal line, at Boston; and Hoyt at the same time remitted to Scudder and company a bill of exchange, drawn by him, as agent, upon the plaintiff, payable to Scudder and company, for \$494.33, which included the freight from Black Rock to Albany, and from Albany to New York, with instructions to Scudder and company to deliver the flour to the plaintiff, on his paying or agreeing to pay the amount of the said bill of

exchange, and, in addition thereto, the freight upon the flour from New York to Boston.

On the arrival of the defendant's vessel at Boston with the flour, November 23d, 1847, the plaintiff demanded the same, and the defendant refused to deliver it, on the ground that he had a lien thereon for the freight. The plaintiff refused to pay the freight, and commenced this action of replevin to recover the flour.

It was in evidence, also, that in the spring of 1847, the plaintiff made a contract with the Western railroad corporation, to transport over their road all the flour which he might have during the year at Albany, or at places west of Albany, the quantity not to be less than twenty thousand barrels; in consideration of which the railroad corporation agreed to transport the same from East Albany to Boston for thirty-two cents a barrel, being three cents a barrel less than the usual charge of transportation; but there was no proof that this contract was known to any one but the parties to it.

It was further in evidence, that the usual time for the transportation of merchandise from Albany to Boston over the Western railroad was two days; and that the price of flour at Boston, between the 10th and the 30th of November, 1847, declined from fifty to seventy-five cents a barrel.

The plaintiff also introduced a letter addressed to him, under date of the 5th, and received by him on the 8th of November, 1847, from William Monteath and company, at Albany, in which they inform him that they had shipped his flour to New York, to be shipped from thence to Boston; that they had done so in consequence of the inability of the railroad corporation to receive the flour; and that this course would be better for the plaintiff than to have stored the flour, until the railroad company was able to receive it, which would have subjected the plaintiff to considerable expense. The plaintiff, in his answer, dated November 16th, 1847, which was also in evidence, desired to know by what authority Monteath and company sent the flour to New York; and informed them that there would be a loss upon it in consequence, of from \$300 to \$400. He added, that he should make his claim for damages as soon as the flour had arrived and been sold.¹

FLETCHER, J. As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton line and the Albany and Canal line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is, whether if a common carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrongdoer, without the consent of the owner, express or implied, he may

¹ The plaintiff's requests for instructions and the ruling of *Dewey, J.*, are omitted.
— ED.

detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other words, whether if goods are stolen and delivered to a common carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner, until the carriage is paid.

It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of *York v. Grenaugh*, 2 Ld. Ray. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, lord chief justice Holt cited the case of an Exeter common carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them, and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of *King v. Richards*, 6 Whart. 418, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in *York v. Grenaugh* of the Exeter carrier. In 1843, there was a direct adjudication, upon the question now under consideration, in the supreme court of Michigan, in the case of *Fitch v. Newberry*, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied: the carrier however was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle settled was, that if a common carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the

owner, such owner may bring replevin for the goods or trover for their value. The case appears to have been very fully considered and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of *Buskirk v. Purin*, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. 267. 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor." "There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent."

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him, without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive

goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of *King v. Richards*, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied, that upon the adjudged cases, as well as on general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.

VAUGHAN *v.* PROVIDENCE AND WORCESTER RAILROAD CO.

SUPREME COURT OF RHODE ISLAND, 1882.

[13 R. I. 578.]

POTTER, J. The cotton in question was purchased in Texas. The original bill of lading, given at Shreveport, La., Feb. 12, 1880, acknowledges the receipt of it in good condition, &c., to be delivered in Providence, R. I., on paying a certain stipulated rate of freight; "rates guaranteed to Providence, R. I." The word Providence was on the bales. The owner's name was not on them, but the cotton was described by other marks.

The cotton seems to have arrived safely at New York, and thence, instead of being forwarded to Providence by a more direct route, was sent to Chicopee, Mass. The mistake seems to have been made in the office of the company in New York, which forwarded it, although there is no very positive evidence as to this. The copy of the bill of lading which was sent from New York with the goods, contained the words, Chicopee, Mass., where the original had the words, Providence, R. I. Both original and copy contain the words, "Notify B. F. Vaughan, Providence, R. I."

The cotton arriving at Chicopee, the officers of the Chicopee Railroad notify Mr. Vaughan, the owner or consignee, by letter of March

6, 1880, directed to Providence; and he replies by letter, dated Providence, March 8th, saying, "You will oblige by forwarding the 51 bales, and any more of this mark that may arrive, billed to me."

The freight to Chicopee was \$284.62. The guaranteed rates would have amounted to about that sum; and if the cotton had not been missent, that sum would have about covered the freight to Providence. This sum the Providence and Worcester Railroad Company paid to the Chicopee Railroad Company, and the plaintiff paid to the Providence and Worcester Railroad Company; but the Providence and Worcester Railroad Company demanding \$65.91 for their own charges and holding the cotton for it, the plaintiff replevied the cotton.

There is no dispute but that the charges from New York to Chicopee, and from Chicopee to Providence, were reasonable, if those roads had a right to make any charge at all.

The goods having by somebody's blunder been missent from New York to Chicopee, was the owner liable for the freight between those two places, and could he have obtained the goods without paying it?

If one person takes another's goods from his possession tortiously, or without his consent express or implied, and sends them by a carrier, it is well settled that the carrier must look to the one who employed him, and has no legal claim or lien for freight as against the owner. In cases of doubt, the carrier must protect himself by requiring payment in advance.

But it seems to be the rule of common sense, and supported by the weight of authority, that when the owner has, by his own voluntary acts, clothed the sender with an apparent authority to act for him, then the carrier has a right to look to the owner for his reasonable charges, and to hold a lien on the goods for the charges, and in judging of the authority we should apply the same principles of evidence that are applied to cases of agency generally. See *Lawson on Contracts of Carriers*, § 224; *York Company v. Central Railroad*, 3 Wall. 107; *Schneider v. Evans*, 25 Wis. 241, 265; *Mallory v. Burritt*, 1 E. D. Smith, 234.

In the present case the owner, by his agents at Shreveport, had placed the cotton in charge of a carrier to be carried by a certain route, and to be forwarded by the usual lines of carriers. He had by this made them successively his agents for forwarding. By a mistake of one of them, in copying the bill of lading to send forward with the cotton, the word Chicopee was inserted as the place of destination when it should have been Providence. Who is to suffer for the mistake of the plaintiff's agent? Certainly not the Chicopee Railroad Company, who have not been in fault; nor the Providence and Worcester Railroad Company, who only paid to the Chicopee road the lawful charges.

Upon any other rule no railroad or steamboat line would be safe in taking goods from a truckman, even from one ordinarily employed by the owner, and the carrier could only protect himself by requiring pay-

ment in advance. And payment in advance to the first carrier for his own line would protect only that first carrier; and succeeding carriers would be obliged to take the same precaution.

There are, perhaps, some cases not easily reconcilable with any sound general rule, and where peculiar circumstances, not always reported, may have influenced the decision. The cases of *Everett v. Saltus*, 15 Wend. 474; also *Saltus v. Everett*, 20 Wend. 267, were cases of fraud in the owner's agent. And as to the distinction between the owner's liability for the fraud and his liability for the negligence of his agent, see *Wharton on Agency*, § 540 and § 476. See, also, *Caldwell v. Bartlett*, 3 Duer. 341.

If the Chicopee Railroad Company had been in fault, so that they would not have been entitled to freight from New York, the owner might have refused to pay it, and might have replevied and tried the question of their right to it at Chicopee. But if, as seems to us, that company was not in fault, having taken the goods from a person or company clothed by the owner with possession and apparent authority, they were not obliged to give them up at Chicopee, except upon the payment of their lawful charges and advances.

If the first carrier has guaranteed a through rate, as he has done in this case, the owner may have his action against him in Shreveport; or he may have an action against the company whose clerk committed the blunder; or he might have replevied the cotton at Chicopee, and had the question decided in Massachusetts.

In this case the first carrier guaranteed the delivery of the cotton at Providence at a certain rate, and, as we have said, but for the mistake it would have been delivered there at about that rate. And it is very ingeniously argued, by the counsel for the plaintiff, that all the carriers subsequent to the first took the goods with full notice of this guaranty, and are, therefore, bound by it. But it is difficult to see how any road not connected with the first is bound by such a guaranty, even if knowing it.

It is further argued that as the Providence and Worcester Railroad Company took the cotton with knowledge of the guaranty, and with knowledge that the cotton had gone out of its usual course, it should be estopped from denying a connecting arrangement for through transportation.

We cannot see that the Chicopee Railroad Company was bound to know that the cotton was on the wrong route. The bags were indeed marked Providence, and B. F. Vaughan, of Providence, was to be notified. But they were to be controlled by the bill of lading, and by that the destination was Chicopee; and it would not have been unreasonable for them to suppose that the owner in Providence might have ordered the cotton to Chicopee for some purpose of his own. We cannot see that there was anything in this to excite suspicion or put them on their guard.

The cotton arrives at Chicopee, the place of its destination by the

bill of lading which accompanied it. The owner is informed of it, as directed by the bill of lading. No person but the owner had any authority to send it further. But for the owner's direction the Chicopee Railroad Company must have held it. They know of no other destination. They had noticed by the bill of lading that the owner had given no authority to send it to any other place. If, so warned, they had forwarded it, and the owner had been damaged by it, *e. g.*, if he had intended to sell the cotton at Chicopee, or to send it to some other place, they might have been liable for the damages.

They did as directed by the bill of lading, notified the owner and awaited his orders.

Judgment for defendant.

DENVER AND RIO GRANDE RAILROAD CO. v. HILL.

SUPREME COURT OF COLORADO, 1889.

[13 Col. 35.]

THE appellee, as plaintiff, filed his complaint against the defendant in the court below, alleging ownership and right of possession to certain grain which he claimed was unlawfully taken and wrongfully withheld from him by the defendant after demand. The value of the property was stated to be \$400. The defendant denied all the allegations of the complaint and claimed a carrier's lien upon the property for transportation from Denver to Colorado Springs, and also for freight charges advanced to the Union Pacific Railway Company. In his replication the plaintiff denied the defendant's claim for a lien upon the property, and alleged that the owner had directed the goods to be shipped from the city of Denver to their destination over the Denver and New Orleans Railroad, a competing line with that operated by the defendant, and averred that the defendant, well knowing such shipping directions, obtained possession of the goods as the result of a conspiracy between it and the Union Pacific Company to divert all traffic from such competing line.

Upon a trial to the court below without the intervention of a jury the issues were found for the plaintiff and a judgment rendered in his favor. To reverse this judgment the defendant brings the case here by appeal.

Mr. Justice HART delivered the opinion of the court.

From the evidence introduced at the trial it is shown that in the year 1883 a car-load of grain was shipped from St. Edwards, Neb., to the appellee, at Colorado Springs. The city of Denver being the nearest point to Colorado Springs upon the line of the Union Pacific road, the consignor directed the goods to be forwarded from Denver to their destination by the Denver and New Orleans road, which directions were plainly marked upon the receipt given for the goods by the agent

of the Union Pacific Company at St. Edwards, and also upon the way-bill filled out at the same time. The agent of the Denver and New Orleans road at Denver, having been informed of the shipment, notified the agent of the Union Pacific road at Denver, shortly before the arrival of these goods, that the former company would insist upon having these goods turned over to it at Denver for transportation over its road to appellee at Colorado Springs, and was informed by the former agent that, in obedience to instructions from his superiors, he must decline to deliver the goods to the Denver and New Orleans road. The agent of the latter road renewed the claim for the goods from day to day, and upon the day of the arrival of the goods in Denver, and while the same were in the yards of the Union Pacific road at Denver, made inquiry in reference to the matter and was informed by the Union Pacific officials that the goods had not yet arrived and could not arrive before the following day. The day after, however, he learned that the goods had arrived the day before and were then at Colorado Springs, having been shipped over the Denver and Rio Grande Railroad, a competing line to the one operated by the Denver and New Orleans Company. It was also shown that it was the common practice at this time for the Union Pacific Company to deliver, and the Denver and Rio Grande road to receive and transport, freight consigned over the Denver and New Orleans road, and that this was done in pursuance of an agreement between the former companies. Mr. Thomas Whitall, the local freight agent of the Union Pacific Railway Company, testified at the trial that Mr. Taylor, agent of the Denver and New Orleans road, at various times presented to him bills of lading for freight in possession of the Union Pacific Company, but routed over the Denver and New Orleans, and that he believes in every instance such freight was sent by the Denver and Rio Grande road, and that in such cases it was customary to furnish the latter company with bills of lading showing the correct routing directions of the goods. The testimony also shows that this was not only done with the knowledge and consent of the general manager and the general freight agent of the Denver and Rio Grande Company, but that these officers were active and vigilant in requiring goods so routed to be diverted to the Denver and Rio Grande road; and that in the few instances in which, in obedience to the directions of the consignors, the goods were delivered to the Denver and New Orleans road, called for a vigorous protest from them, coupled with an implied threat of retaliation against the Union Pacific Company.

No attempt was made by appellant to disprove the evidence introduced by the appellee in the court below. It is, however, contended upon this appeal that the judgment is contrary to law.

It has been held that a carrier receiving goods to be transported beyond its line, in delivering them to a subsequent carrier acted as a special agent of the consignor, with limited powers; and if it disregarded its instructions and exceeded its authority, the subsequent

carrier could not maintain a lien upon the goods for its transportation charges. *Fitch v. Newberry*, 1 Doug. (Mich.) 1. In later decisions in other States the doctrine of the Michigan court, however, has not been followed; the courts now generally holding that a carrier receiving goods to be transported over its own line to a point beyond has the apparent authority to select any of the ordinary routes leading thereto, and that the second carrier receiving the goods in good faith, in the ordinary and usual course of business between connecting lines, without notice of any special directions on the part of the consignor, will have a lien for his reasonable charges for transporting such goods over its own line, and also for such reasonable charges as it may have advanced to the first carrier. *Price v. Railroad Co.*, 12 Colo. 402.

An examination of the opinion of Commissioner Stalcup in the case just cited will show that, while the right of the consignors to select the routes over which the goods should be transported is fully recognized, it is held that in case his instructions in reference thereto are not obeyed by the first carrier, the owner's action was not against the innocent second carrier, but against his own wrong-doing agent. In support of this position the following cases were relied upon: *Patten v. Railroad Co.*, 29 Fed. Rep. 590; *Schneider v. Evans*, 9 Amer. Law Reg. (N. S.) 536; *Briggs v. Railway Co.*, 6 Allen, 246.

In the first two cases cited the ignorance of the second carrier of the terms of the contract is made an express condition of its exemption from liability in case of loss to the owner. And a reading of the opinion in the case of *Briggs v. Railway Company*, *supra*, will also show that in that case no wrong or negligence was attributable to the defendant company. In the case at bar, however, we have seen that the Union Pacific and the Denver and Rio Grande Companies had entered into an agreement to disregard all directions requiring goods to go over other lines, and that, in pursuance thereof, all routing directions to the contrary were being ignored by both companies; that the general officers of the appellant company were zealously enforcing a compliance on the part of the Union Pacific Company with such agreement; that it was customary for the latter company to deliver goods routed over the Denver and New Orleans road to the Denver and Rio Grande road for transportation; and that goods were so received and forwarded by the latter company, with full knowledge that the same was in violation of the owner's directions, and that the officers of the road entered a vigorous protest whenever the Union Pacific Company delivered goods to the Denver and New Orleans road for transportation, although such delivery was in accordance with the express directions of the owner of the property. The evidence shows that the shipping directions in reference to the goods in controversy were willfully violated by the Union Pacific Company, and we think, under the evidence, the court below was justified in holding the Denver and Rio Grande Company also responsible for such violation.

This company having been a party to an illegal contract providing

not only for a violation of the owner's routing directions, but calculated also to prevent notice of such directions from reaching the second carrier, cannot be shielded in this instance because no witness was able to swear in direct terms that it had notice of the owner's directions in reference to the shipment of these particular goods. Under these circumstances we are of the opinion that the court below was warranted in finding that the possession of the property was not obtained in good faith by the defendant in the ordinary or usual course of business between connecting carriers, but that such possession was wrongful and illegal, and that the defendant was consequently not entitled to a carrier's lien upon the same, either for its own charges or those advanced to the former carrier, and therefore there was no error in entering judgment for plaintiff. Redf. Carr. § 271 *et seq.*; *Fitch v. Newberry*, *supra*; *Robinson v. Baker*, 5 Cush. 137; *Andrew v. Dieterich*, 14 Wend. 31; *Briggs v. Railroad Co.*, *supra*. The judgment is accordingly affirmed. *Affirmed.*¹

Chief Justice HELM not sitting.

BIGELOW v. HEATON.

SUPREME COURT, NEW YORK, 1843.

[6 Hill, 43.]

COWEN, J. In this case the plaintiff, being the owner of a canal boat of which D. Blakely was master, received on board a cargo of flour to be delivered to the defendant at the city of New York, he to pay the freight. On the arrival of the flour at New York, Blakely called upon the defendant for money on account of the freight to pay his men. This was declined till the flour was delivered, the defendant promising that, on delivery, he would pay all charges. It was delivered accordingly, when he refused to pay, unless the master would deduct six cents per barrel as a compensation for pretended injury which the flour had sustained in the manner of delivery, but of which there was no proof. The plaintiff disaffirmed the act of delivery, and, through his agent, the master, demanded the restitution of the flour. This being refused, he brought replevin, and the judge nonsuited him.

If the transaction was a trick on the part of the defendant, who intended to obtain the flour, and then coerce the master into an unreasonable deduction from his freight, the delivery was voidable, and the plaintiff entitled to recover. We think it was susceptible of that construction; and that the question should have been submitted to the jury. It is well settled that where a vendee obtains goods with an

¹ Compare: *Bird v. R. R.*, 72 Ga. 655; *Robinson v. Baker*, 5 Cush. 137; *Crossan v. R. R.*, 149 Mass. 196; *Fitch v. Newberry*, 1 Doug. 1; *Bowman v. Hilton*, 11 Ohio, 303; *Knight v. R. R.*, 13 R. I. 572. — ED.

intent not to pay for them, this is a fraud which avoids the contract at the election of the vendor, who may treat the defendant as a wrong-doer, and recover the goods specifically. The same consequence is predicable upon the same principle, where goods are obtained with an intention to defraud the carrier of his freight, or any part of it. The only difference lies in the latter object being so contemptibly insignificant as to raise a doubt whether any man would be guilty of fraud in its accomplishment. It is said that a lien is always forfeited by delivery. That is indeed so; and the same thing may be said of a right to the goods in specie, where they are delivered by the vendor. But a delivery procured by fraud is not within the rule. It is void at his election; in other words, it is no delivery. The difference between that case and the like fraudulent act of obtaining goods from a carrier or other lien-holder, consists in the one being a fraud against the general and the other against the special property, which is a difference in words only; not of principle. It is said the plaintiff may bring assumpsit for the freight. So may the vendor sue for the price of his goods; but he may also bring replevin. *New trial granted.*

HUNT v. HASKELL.

SUPREME JUDICIAL COURT OF MAINE, 1844.

[24 Me. 339.]

WHITMAN, C. J. The defence, as exhibited, cannot be sustained. The defendant was a packet master; and, as such, undertook to bring, for the plaintiff, certain boxes of merchandise, of which those named in the declaration were a part, in his packet, from Boston to Bangor; and in January, 1842, arrived with them at Frankfort, which, owing to the ice in Penobscot river, was as near as he could convey them, in his vessel, to the port of destination; and there landed them, and demanded his freight, and advances, which he had made on account of them in Boston. The plaintiff, thinking he demanded too much, tendered what he admitted to be due; and demanded his goods. The defendant refused to receive the amount so tendered, and caused the quantity sued for to be sold at auction for the amount claimed by him, and the expenses of sale. The plaintiff thereupon instituted this action of trover to recover the value thereof.

It is very clear that the defendant had no right to cause the sale to be made of his own mere motion, and without the intervention of legal process for the purpose. The law merchant recognizes no such right on the part of carriers by sea, under a common bill of lading, such as the defendant had signed in this instance. If the plaintiff was willing to receive his goods at Frankfort, which by his tender and demand of them there, it seems he was, the defendant might well insist on a *pro*

rata freight, and on detaining the goods until it was paid; but a simple detention only, in the first instance, was all that could be insisted on.

It is urged, that the defendant was without a convenient remedy, unless the course he pursued can be sanctioned; that the Courts of this State, having no jurisdiction in equity in such cases, the only resort, if the defendant could not sell as he did in this case, must be to the United States Court of admiralty, which would be extremely inconvenient; and, therefore, that it is highly proper to uphold the proceeding adopted by the defendant. But it is not for Courts to alter an established law. It is the duty of Courts, as has often been remarked, to expound and apply the law, as it may be found established and not to legislate.

But it appears that the plaintiff attended the auction, and, through the intervention of a friend, regained possession of his goods, by paying the auction price, and five dollars more to his friend; and it is not shown that, when so received, they were not in good order. This must be allowed to go in diminution of the damages, which the plaintiff would otherwise be entitled to recover. Whatever damages he sustained, over and above what was fairly due to the defendant, in regaining possession of his goods, he is entitled to have allowed him. The five dollars paid to his friend for bidding off the goods; five dollars and thirty-one cents for auctioneer's fees; five dollars for his own time in endeavoring to regain possession of his goods, and six dollars, being the difference between the freight demanded, and the amount tendered, with interest on these sums, making twenty-two dollars and fifty cents, the plaintiff must have judgment for. *Murray v. Burling*, 10 Johns. R. 172; *Bank v. Leavitt*, 17 Pick. 1.

He cannot have judgment for the value of the goods; for he was never divested of his property in them. Neither the acts of the defendant, nor the sale at auction, nor being in market overt, there being none such in this country, as there is in England, could effect a change in the right of property. The plaintiff, if his tender was sufficient, might have maintained an action of replevin for his goods, against the defendant, or against a purchaser at the auction sale, as well as trover against the defendant; and the latter action is maintainable only upon the ground that the defendant had done, in reference to the goods, what was unauthorized by law. *Defendant defaulted for \$22.50.*

ROBERTS v. KOEHLER.

CIRCUIT COURT OF THE UNITED STATES, 1887.

[30 Fed. 94.]

DEADY, J. This action was brought against the defendant, the receiver of the Oregon & California Railway, to recover damages for alleged maltreatment of the plaintiff while travelling on the road be-

tween Portland and Ashland, Oregon. The cause was tried with a jury, who gave a verdict for the defendant, and is now before the court on a motion for a new trial. It appeared on the trial that the plaintiff purchased from the defendant a combination ticket from Portland to San Francisco, where he resided, and started on the south-bound Oregon & California train on July 13, 1885; that about 200 miles south of Portland the conductor cut off from said combination ticket and took up the coupon, entitling the plaintiff to transportation on the railway between Portland and Ashland, a distance of about 300 miles, and gave him his private check for future identification; that at Grant's Pass, a station some miles south of Roseburg, the plaintiff was left behind, and a large leather valise belonging to him was carried on the train to Ashland. The next passenger train going south passed Grant's Pass in the evening of July 14th, and the plaintiff got on the same, when the conductor, in obedience to the rules of the company, demanded his fare to Ashland, \$1.79, which the plaintiff refused to pay, alleging that he had paid his fare once, and had been left behind by the misconduct of the conductor on the train of the day previous, to which the conductor replied that he would give him a receipt for the payment, and, if his statement proved correct, the money would be refunded to him. The plaintiff still refused to pay, and suggested to the conductor that he might put him off the car, to which the latter replied that he would hold his valise for the fare. When the train arrived at Ashland, the plaintiff attempted to take his valise out of the office where it had been deposited the day before, which the conductor resisted, and, with the aid of a brakeman, finally prevented.

The plaintiff in his testimony attributed his being left at Grant's Pass to the misconduct of the conductor in starting the train without warning, and without waiting the usual time. But on the whole evidence it was so manifest that his testimony was grossly and wilfully false in this respect, and that he was left in consequence of his own wilfulness in leaving the train just as it was about to start, and after he was warned of the fact, and going some distance from the track to get something to eat, that his counsel abandoned the claim for damages on that account before the jury, and only asked a verdict for the alleged mistreatment of the plaintiff at Ashland in the struggle for the possession of the valise.

The court instructed the jury that, if they believed the plaintiff's statement about the affray at Ashland arising out of his attempt to possess himself of the valise, they ought to find a verdict for him, but if they did not believe it, and were satisfied that the conductor used only such force as was necessary and proper to prevent the plaintiff from taking the valise out of the possession of the defendant without first paying the extra fare, they ought to find for the defendant. In this connection the court also instructed the jury that under the circumstances the defendant had a lien on the plaintiff's valise for his fare from Grant's Pass to Ashland on July 14th, and there the con-

ductor had a right to retain the possession of the same until such fare was paid. To this latter instruction counsel for the plaintiff then excepted, and now asks for a new trial on account thereof.

A carrier of passengers is responsible, as a common carrier, for the baggage of a passenger, when carried on the same conveyance as the owner thereof. The transportation of the baggage, and the risk incurred by the carrier, is a part of the service for which the fare is charged. *Hollister v. Nowlen*, 19 Wend. 236; *Cole v. Goodwin*, Id. 257; *Powell v. Myers*, 26 Wend. 594; *Merrill v. Grinnell*, 30 N. Y. 609; *Burnell v. New York Cent. Ry. Co.*, 45 N. Y. 186; *Thomp. Carr.* 520, § 8; *Story, Bailm.* § 499. Correspondingly, a carrier of passengers has a lien on the baggage that a passenger carries with him for pleasure or convenience. *Overt. Liens*, § 142; *Thomp. Carr.* 524, § 11; *Ang. Carr.* §375; 2 *Ror. Rys.* 1003, § 11. But this lien does not extend to the clothing or other personal furnishings or conveniences of the passenger in his immediate use or actual possession. *Ramsden v. Boston & A. Ry. Co.*, 104 Mass. 121.

A ticket for transportation on a railway between certain *termini*, which is silent as to the time when or within which it may be used, does not authorize the holder to stop over at any point between such *termini*, and resume his journey thereon on the next or any following train. The contract involved in the sale and purchase of such a ticket is an entire one, and not divisible. It is a contract to carry the passenger through to the point of his destination as one continuous service, and not by piecemeal, to suit his convenience or pleasure. 2 *Ror. Rys.* 971, § 10; 2 *Wood, Ry. Law*, § 347; *Cleveland, etc., Ry. Co. v. Bartram*, 11 Ohio St. 457; *Drew v. Central Pac. Ry. Co.*, 51 Cal. 425.

Admitting these legal propositions, counsel for the plaintiff insists that the defendant had no lien on the valise in question, and therefore no right to retain it; and in support of this proposition he ingeniously argues that the journey from here to Ashland was divided into two distinct parts,—one from Portland to Grant's Pass on July 13th, for which his fare was paid to Ashland, and on which the valise went through to that point, and one from said pass to Ashland, on which, although no fare was paid, yet no baggage was carried.

Before considering this proposition it is well to remember that the undertaking of the company to transport this valise, as baggage, was only incidental to the principal undertaking to carry the owner thereof; and, when the latter was performed or discharged, the former was also. Therefore, if the journey in reference to which the defendant undertook to carry the same ended, by the act of the plaintiff, at Grant's Pass, the carriage of the valise from there to Ashland on the same train was an additional service performed for him, for which the defendant was entitled to an additional compensation as the carrier of so much freight, and had a lien thereon for the same; for a traveller is not entitled to have his personal baggage carried in consideration of the fare paid by him, unless it is on the same train which carries him. *Thomp. Carr.* 521, § 8.

But, in my judgment, the transaction must be regarded, for the purpose of this question, as one journey, in the course of which the plaintiff incurred an additional charge of \$1.79 for transportation. In effect, the plaintiff paid his fare to Ashland on the train of July 13th, with the privilege of stopping over at Grant's Pass, and finishing the journey on the next day's train, on the payment of the extra charge of \$1.79. He saw proper to avail himself of this privilege, and thereby became indebted to the defendant accordingly. And whether the plaintiff allowed his baggage to be carried through on the first train, or kept it with him, the defendant had a lien on it for all the unpaid charges for transportation which the plaintiff incurred during the journey. There was but one contract for the transportation of the plaintiff, including his baggage, which was modified or altered, in the course of its performance, by his own act or omission.

Suppose there were first and second-class carriages on this road, and on July 13th the plaintiff paid for and took passage in one of the latter for Ashland, but, arriving at Grant's Pass, he got into one of the former, and rode to Ashland, refusing to pay the additional fare when demanded, can there be any doubt that the defendant would have a lien on his baggage for the same, and might, if he had or got possession of it, retain it until such fare was paid? Certainly not. Substantially, this is the parallel of the plaintiff's case. The defendant was clearly in the right in detaining the valise until the fare was paid, and the plaintiff was as clearly in the wrong in attempting to take it without doing so. Indeed, his conduct throughout this transaction looks very much like he was playing a game to involve the defendant in a lawsuit out of which he might make some money.

The motion for a new trial is disallowed

ROBINS AND CO. v. GRAY.

QUEEN'S BENCH, 1895.

[1895, 2 Q. B. 78.]

ACTION tried before WILLS, J., without a jury.

The plaintiffs were a firm of dealers in sewing-machines and other articles, and in 1894 they had in their employment one Edward Green as a commercial traveller, who canvassed for orders and sold their goods upon commission. In April, 1894, Green went to stay for the purposes of his business as such traveller at the defendant's hotel, and remained there until the end of July. While he was there the plaintiffs sent to him from time to time certain sewing-machines, watches, chains, and musical albums, which it was in the ordinary course of his business to have at the inn for the purpose of selling them to customers in the district. At the end of July Green was in the defendant's

debt for board and lodging to the amount of £4 0s. 8d., which sum he neglected to pay. The defendant claimed a lien in respect of this debt upon certain of the goods which had been so sent by the plaintiffs by Green, and detained them accordingly. Before the goods in question had been received into the hotel, or the said debt had been incurred, the defendant had been expressly informed by the plaintiffs that the goods were the plaintiffs' property, and not the property of Green. The plaintiffs brought detinue.

WILLS, J. The law applicable to this case is, I think, clear. The defendant no doubt knew, at the time that Green's debt to him was incurred, that the goods upon which he now claims to have a lien were the goods, not of Green, but of his principals. But that fact is, in my opinion, immaterial. The goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while they were there. Here it is true that the goods were not brought by Green to the inn — they were sent to him while he was staying there. But that can make no difference. The defendant was bound to receive them and take care of them, as a part of his duty towards his guest. It follows that the lien attached to them. Knowledge on the part of the innkeeper that the goods brought by, or sent to, the guests are not the guest's property, is in my judgment material only where the goods are of a description which the innkeeper is not bound to receive, such as the piano in the case relied on by the plaintiff.

*Judgment for the defendant.*¹

CROMMELIN v. NEW YORK AND HARLEM RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1868.

[4 *Keyes*, 90.]

THIS was an action of replevin to recover the possession of a quantity of marble. The jury found for the defendants. The plaintiff appealed to the General Term of the Superior Court of the city of New York, where a new trial was ordered. From this order the defendants appeal, and stipulate that if the said order be affirmed by this court, judgment absolute shall be rendered against the said appellants.

The defendants had transported upon their railroad certain marble

¹ Compare: *Robinson v. Walter*, 3 Bulst. 209; *Broadwood v. Granara*, 10 Exch. 417; *Threfall v. Borwick*, L. R. 7 Q. B. 711; *Singer Co. v. Miller*, 52 Minn. 516; *Covington v. Newberger*, 99 N. C. 523; *Cook v. Prentice*, 13 Ore. 422; *Grump v. Showalter*, 48 Pa. St. 507; *Clayton v. Butterfield*, 10 Rich. L. 300; *Manning v. Hollenbeck*, 27 Wis. 202.—ED.

belonging to the plaintiff and to be delivered to him in New York. The marble arrived in New York on the 11th of October, 1860. The defendants proved that previously to this time, they had given notice to the plaintiff that his freights must be removed within forty-eight hours after their arrival, or that one dollar a day for each car detained, would be charged for such detention. They further proved that this was the general custom of the company. They also proved that on the 12th day of October, 1860, they sent the following notice to the plaintiff: "The following property has arrived at this station consigned to you, which you are notified to take away without delay, as this company will assume no responsibility in regard to property after its arrival here. John Barker, agent, Forty-second street depot. Three cars marble. I am instructed to say one dollar a day will be charged for the use of each car after the marble has remained at the depot forty-eight hours." The cars remained upon the track in the Fourth avenue with the marble upon them, until the 18th of October, when the plaintiff paid the freight and demanded the marble. The defendants refused the delivery unless the plaintiff would pay the charge of one dollar per day for each car detained longer than forty-eight hours, which the plaintiff refused to do. The defendants' road occupied a portion of the Fourth avenue, a public highway of the city of New York, and during the period from the 11th to the 18th of October, the open cars containing the marble in question, stood upon the rails which were laid upon said avenue, at or near Forty-second street.

HUNT, Ch. J. It is to be assumed from the evidence and from the finding of the jury, that the plaintiff had received notice on the 12th of October, 1860, of the arrival of his marble. It is to be further assumed, although the evidence was contradictory on that point, that the plaintiff had been informed by the agent of the defendants, that a charge would be made for the detention of the cars longer than forty-eight hours. Had an action been brought to recover the damages or the agreed price for this detention, it would, upon these facts, have been sustainable.

The legal question here is, had the defendants a lien upon the marble for the delay in taking it, which justified their refusal to deliver it. That the defendants had a lien for the freight of the marble is not denied. The plaintiff conceded it and paid the amount before demanding the marble. The lien of an innkeeper or of a common carrier, is well established. So the principal is well established generally, that every bailee who bestows labor, care or skill upon an article intrusted to his possession, may retain the article until the amount due to him for such care, labor or skill, shall be paid. The watch repairer, the blacksmith and the tailor are the instances usually cited by way of illustration. On the other hand, A being stable-keeper or an agister of cattle, has no such lien. He must deliver the horses or the cattle to the owner upon demand, and seek his remedy upon his contract. (*Allen v. Chapman*, *Croke Car.* 271; *Blake v. Nicholson*, 3 M. & S.

168; *Jackson v. Cummings*, 5 Mees. & W. 341; *Pinney v. Wells*, 10 Conn. 105; *Grinnell v. Cook*, 3 Hill, 486; *Morgan v. Congdor*, 4 Conn. 522.) In the present case the marble was not deposited in any warehouse or place of storage. The character of a warehouseman, or any liability for its protection or storage, after forty-eight hours, was expressly disclaimed by the defendants, in their notice of October 12th. It was never removed from the cars, but remained upon them in the public highway, until after the plaintiff had demanded its delivery to him. The defendants insist, that by the goods being left upon their cars, and by the delay of the plaintiff to remove them within forty-eight hours after their arrival, injury, inconvenience and expense was suffered by them. This is quite probable. It constitutes, however, a claim in the nature of demurrage, and does not fall within the principle of those transactions, which gives a lien upon the goods. It is a breach of contract simply, for which, as in case of a contract in reference to pilotage or port charges, the party must seek his redress in the ordinary manner. (*Abbot v. Shipping*, 286; *Birley v. Gladstone*, 3 M. & S. 205.)

The order of the General Term directing a new trial must be affirmed and judgment absolute is ordered for the plaintiff, and a writ of inquiry should issue to the sheriff of New York to assess the damages, unless the same shall be agreed upon by the parties.

Judgment affirmed.

SCHUMACHER *v.* CHICAGO AND NORTHWESTERN RAILWAY CO.

SUPREME COURT OF ILLINOIS, 1904.

[207 Ill. 199.]

RICKS, J. Appellant brought an action of replevin in a justice's court in Lake county against appellee for three tons of coke. Judgment was for appellee in the justice court. On appeal to the circuit court of said county a trial was had before a jury, and the court directed a verdict for appellee and entered judgment thereon. Appeal was taken to the Appellate Court, where the judgment of the lower court was affirmed, and this appeal was prosecuted.

Appellant is a resident of Highland Park, and in June, 1902, purchased and caused to be shipped to himself at said place over appellee's road two cars of coke. The cars arrived in Highland Park on June 20, at seven o'clock in the morning, and at nine o'clock in the morning of the same day appellee's station agent at said point mailed appellant notice of the arrival of the cars. Appellant is a practising lawyer residing at Highland Park and having his office in the city of Chicago, and on the same morning of the arrival of the cars, and shortly after

the mailing of the first notice, appellee's agent saw appellant personally and informed him that said cars had arrived. At that time appellee's agent did not know the freight charges, and neither by the first postal card nor by verbal statement was appellant informed on that day of the freight charges. On the morning of the 21st appellee's agent again notified appellant of the arrival of said cars, sending notice by postal card through the mail, which was received by appellant between 8:30 and 9 o'clock in the morning of that day. On the postal card so sent to appellant, after describing the freight, was the following: "Which is now at your risk; please pay charges and remove property within twenty-four hours, or same will be charged storage or delivered to warehouseman; all car-load freight shall be subject to a minimum charge for trackage and rental of one dollar per car for each twenty-four hours' detention, or fractional part thereof, after the expiration of forty-eight hours from its arrival at destination." And across the face of said postal card was stamped the following: "If this car is not unloaded within forty-eight hours from 7 A. M., June 21, 1902, a charge of one dollar per day, or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car." Upon the 21st of June, and after the receipt of the postal card by appellant on that day, he went to appellee's station and there paid its agent the freight, taking a receipt therefor, and on each of the freight bills was stamped a notice identical with the one last above quoted. When appellant received the freight receipts he called the attention of appellee's agent to the notice with reference to the charge for car service contained thereon, and stated to him that he could not get the cars unloaded within forty-eight hours, or anywhere near that time; also recalled the fact that he had had trouble a year or so previous to this shipment with this same company at the same station, growing out of appellee's insistence upon the enforcement of the above rule. Appellant then engaged one James H. Duffy, whose business was the hauling of coal and coke, to haul the same for him, but was informed by said Duffy that he could not begin the work until the following Monday, June 21 being on Saturday. One car was unloaded by Tuesday, June 24. On Thursday, June 26, the other car was only partially unloaded, and appellee, through its agent, notified Duffy, who was hauling the coke, that he could haul no more until the car service due from the delay in unloading had been paid. A controversy then arose between appellant and appellee, which resulted in the suing out of the writ of replevin on Monday, June 30, there remaining about three tons of coke in one car, which appellee had sealed and refused to allow to be removed until the car service was paid.

The evidence further shows that the cars, on their arrival on Friday, June 20, were placed on a stub-track, where they could be approached from one side and unloaded, and on the 21st of June were placed at the end of another stub-track, so that their removal was unnecessary until they were unloaded, and could be approached from both sides,

for the purpose of unloading, without interference from switching so long as they remained at that point. The two cars in question came from and belonged to other railroad lines, one being from the Baltimore and Ohio Railroad Company and the other from the Illinois Central Railroad Company; that appellee had no warehouse for the unloading of bulk freight, such as car-loads of coal and coke at Highland Park station, and that freight such as that in question is uniformly loaded and unloaded by the shipper and consignee.

The evidence further shows that in what was called "Chicago territory," and embracing a considerable scope of country surrounding the city of Chicago, and including Highland Park, was an association called the "Chicago Car Service Association," which was a joint association including all the railroads within that territory, all of which united in the selection of a single agent, known as the "Car Service Association agent," the purpose and business of which association were to facilitate the loading and unloading of cars and for the securing of prompt service to shippers; that this agency or association had existed since 1888, and that appellee was a member of such association; that the United States, with reference to railroad traffic, was divided into forty-two districts, each having a similar association; that certain rules, designed to effectuate the purpose of such association, were formulated and published by it and observed by all its members and brought to the attention of shippers, as business between them arose and was conducted; that among the rules were rules 2, 4 and 5, as follows:

"2. Forty-eight hours' free time will be allowed for loading or unloading all cars, whether on public tracks or on private tracks, at the expiration of which time a charge of one dollar per car per day, or fraction thereof, shall be made and collected for the use of cars and tracks held for loading or unloading or subject to the orders of consignors or consignees or their agents.

"4. In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.

"5. On cars arriving after 6 p. m. of any day, car service will be charged after the expiration of forty-eight hours from 6 p. m. on the day following."

The evidence showed that in the city of Chicago alone there were shipped in, approximately, 75,000 cars of coal and coke every month; that the average earning capacity of freight cars upon twenty-nine railroads in the association, for the year 1901, was \$2.42, and on appellee's road \$2.15 per day.

Under the above state of facts appellee contends that it was entitled to charge a car service or car track service of one dollar per day, after the expiration of forty-eight hours, upon these cars, and that it was entitled to a lien upon the coke, the same being the freight contained in them, for the payment of such charges. Both of these propositions

are denied by appellant, and arise upon the peremptory instruction for a verdict, given by the trial court.

Under the constitution and laws of this State railroads are public highways and railroad corporations are *quasi*-public corporations. They are chartered by the State and may invoke the right of eminent domain for the acquirement of lands necessary for the conduct of their business. Regarding them as public agencies, discharging duties in which the public is interested, the State regulates and controls their rates and tolls, both for the carrying of freight and passengers, and in many other respects regulates and controls their operation. Upon the payment or tender of the legal tolls, freight or fare, such companies are required to furnish cars and transport freight and passengers within a reasonable time, and upon their failure to do so they are subject to treble damages to the party aggrieved, and in addition thereto a penalty or forfeiture to the school fund of the State. (Hurd's Stat. 1899, chap. 114, pars. 84, 85.) They must receive and transport cars loaded and unloaded over their lines, and in doing so assume the liability of a common carrier as to both such cars and freight. (Peoria and Pekin Union Railway Co. *v.* Chicago, Rock Island and Pacific Railway Co. 109 Ill. 135.) They may not discriminate against shippers in rates or facilities for shipping, and are required to make special provision for the handling and shipping of grain. All of these regulations by the State are justified and sustained upon the ground that the State is interested in the prompt and proper carriage of its products and the commerce of its people, and it would seem that reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of the public duty, should, where they are not in violation of some positive law, be sustained.

Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when the car containing the freight is delivered to the consignee upon his own track or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, with reasonable and proper opportunity to the consignee to take the same, or when placed in the warehouse of such company or the warehouse of another selected by them, in any and all such cases such companies then bear to such freight the relation of warehousemen. (Peoria and Pekin Union Railway Co. *v.* United States Rolling Stock Co. 136 Ill. 643; Gregg *v.* Illinois Central Railroad Co. 147 id. 550.) If the cars in which such freight is shipped are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein. (Peoria and Pekin Union Railway Co. *v.* United States Rolling Stock Co. *supra*.) Such are the duties of such com-

panies appertaining to bulk freight in car-load lots, which, it may be said, by the uniform rule and custom of this country are to be loaded and unloaded by the shipper and consignee. Small or package freight, of such character and bulk that that belonging to many distinct owners may be shipped in a single car, is commonly loaded and unloaded by the transporting company or companies. When such freight reaches the point of destination and is placed in the freight depot or warehouse of such company it is held by such company as a warehouseman, and when a railroad company carries freight to its point of destination and stores the same in its warehouse, and the relation of warehouseman is established by the failure to remove the property within a reasonable time, the liability of a warehouseman attaches, and not the liability of a common carrier. *Illinois Central Railroad Co. v. Alexander*, 20 Ill. 24; *Porter v. Chicago and Rock Island Railroad Co.* id. 408; *Merchants' Dispatch Transportation Co. v. Hallock*, 64 id. 284; *Illinois Central Railroad Co. v. Friend*, id. 303; *Rothschild v. Michigan Central Railroad Co.* 69 id. 164; *Merchants' Dispatch and Transportation Co. v. Moore*, 88 id. 136; *Anchor Line v. Knowles*, 66 id. 150.

It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him and to be present and receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier, (*Merchants' Dispatch Transportation Co. v. Hallock*, *supra*.) and when such freight is in the warehouse the railroad company may charge storage upon the same, and it has a lien upon the freight so stored for its storage charges, and this rule obtains although the company may have given the consignee notice to remove the property within twenty-four hours. *Richards v. Michigan Southern and Northern Indiana Railroad Co.* 20 Ill. 405; *Porter v. Chicago and Rock Island Railroad Co.* *supra*; *Illinois Central Railroad Co. v. Alexander*, *supra*.

When a railroad company delivering freight at its point of destination has no warehouse at that point suitable for the storage of bulk freight in car-load lots, and the property is of such character that the cars in which it is transported furnish a proper and safe place for the same, so that it is not liable to damage or deterioration arising from heat or cold or the elements, there would seem to be no reason for requiring the transporting company to seek a warehouse of another and add the cost of removal to the cost of storage when said freight may properly be held in storage in the cars in which the same was carried; and after notice to the consignee, and a reasonable time to remove the same, reasonable storage charges may be collected therefor and the freight held for the payment thereof. *Miller v. Mansfield*, 112 Mass. 260; *Miller v. Georgia Railroad Co.* 88 Ga. 563; *Gregg v. Illinois Central Railroad Co.* 147 Ill. 550.

In *Gregg v. Illinois Central Railroad Co.* the action was for damage to grain by water, which had been stored by the railroad company in a

warehouse in Augusta, Georgia. The grain was not received promptly upon arrival at its destination and was stored, and while in storage was injured by a flood. In speaking of the duty of the company with reference to such freight, this court said (p. 560): "The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner."

In *Miller v. Georgia Railroad Co. supra*, it is said (p. 563): "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them; and we think where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may, in many cases, be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the consignee's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car by requesting or permitting the carrier to continue holding it unloaded in service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

In *Miller v. Mansfield, supra*, it was said: "It is not material that the goods remained in the cars instead of being put into a storehouse."

In the case at bar appellant did not discharge his duty to the appellee by being present and ready to receive his freight upon its arrival. Within two or three hours of its arrival he was notified thereof, and after it had lain there twenty-four hours and said car was placed where appellant had full and fair opportunity to remove the freight without interference in any form and to approach the car from both sides for that purpose, and when appellee's duty as a common carrier had ceased, appellant was notified that he must remove the same within forty-eight hours, or a car service or storage charge, which, under the circumstances, must be held to be the same thing, of one dollar per car would be insisted upon. Appellant also knew, by the previous dealings between himself and appellee, that such rule obtained, and unless he could show that the limit of time was unreasonable or the charge excessive, it would seem appellee's contention to charge as for storage should be upheld.

It is also urged by appellee that the right to demand such charge and enforce the same by lien arises from the unreasonable detention of the cars in question by appellant, and that such charge is in parity with and in the nature of demurrage as it exists under the maritime law, and not based upon the theory of storage charges; that it was the duty of appellant to take notice of the arrival of his freight and to be present and ready to receive the same when it did arrive, and that having failed to do this, he having notice of the rule of the company to charge for the detention beyond the period of forty-eight hours, a car and track service in the nature of demurrage may properly be demanded. The evidence in this case shows that by the enforcement of the rule here insisted upon, the transportation facilities in the car service territory here involved was increased practically one hundred per cent, and that only about seven per cent of the shippers or consignees, through its operation, hold their cars overtime. If such common carriers must comply with our statute and must furnish transportation for people and freight when demanded, and such companies have made proper provision in equipping their roads with an ample supply of rolling stock, and yet, because of the dilatoriness or perversity of shippers and consignees, cars may be held indefinitely at loading and discharging points, contrary to the desires and interests of such companies, then it must be plain that the statute must either fall as a dead letter or its enforcement must work great injustice to such companies.

This precise question seems not to have been before this court previous to the present case. In 1891 the Attorney General of this State, in an opinion to the Railroad and Warehouse Commissioners in complaint No. 64, *Union Brewing Co. of Peoria v. Chicago, Burlington and Quincy Railroad Co.*, and complaint No. 71, *Lyon & Scott v. Peoria and Pekin Union Railroad Co.* said: "Section 5 of the act in relation to receiving, carrying and delivering grain in this State provides that a consignee of grain transported in bulk shall have twenty-four hours, free of expense, after actual notice of arrival, in which to remove the

same from the cars of such railroad corporation. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived, in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the car service association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable, under all circumstances. . . . Demurrage is an important subject, which has arisen in a practical way only within late years and long after our statute for the regulation of railroads was passed. It does not, however, follow that because there is no statutory regulation of the question there is no law."

Mr. Elliott, in his work on Railroads, (vol. 4, sec. 1567,) says: "But while it is probably true that this right is derived, by analogy, from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them, after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading, of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way." And to the like effect are *Miller v. Georgia Railroad Co.* *supra*; *Norfolk and Western Railroad Co. v. Adams*, 90 Va. 393; 44 Am. St. Rep. 916; *Darlington v. Missouri Pacific Railroad Co.* 72 S. W. Rep. 122; *Inter-State Commerce Commission v. D., G. H. & M. Ry. Co.* 74 Fed. Rep. 803; *American Warehouse Ass. v. Illinois Central Railroad Co.* 7 Inter-State Com. Rep. 556.

Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right and contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods transported by it when not received by the consignee promptly at the place of delivery. *Miller v. Mansfield*, *supra*; *Merchants' Dispatch and Transportation Co. v. Moore*, 88 Ill. 136; *Illinois Central Railroad Co. v. Alexander*, 20 id. 24; *Darlington v. Missouri Pacific Railroad Co.* *supra*; *Barker v. Brown*, 138 Mass. 340.

It is claimed, however, by appellant that the case of *Chicago and Northwestern Railway Co. v. Jenkins*, 103 Ill. 588, lays down the rule contrary to the views we have above expressed, and that that case should be controlling in the present case. We think not. That case seems to have related to or grown out of the shipment of goods in less quantity than a car-load lot. The character of the goods was of a perishable nature, and such, if removed from the cars, must be stored, and in distinguishing that case from cases under the maritime law, and denying that the rule applicable in contracts of shipment under the latter law applied to railroad companies, it was said (p. 600): "But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee." Thus, it will be seen that the court could not have had in mind the case of the shipment of goods of the character here involved by car-load lots, and where the undisputed evidence shows that the rule is that such freight shall be loaded by the shipper and unloaded by the consignee, and that railroads do not have warehouses in which to store that class of goods.

Appellant contends that the trial court erred in not permitting him to show, as tending to show whether the coke was unloaded within a reasonable time, the distance from his house to the station where said car was placed for unloading. In this, we think, there was no error. If such is the rule, and as there were 57,000 pounds of coke in this shipment, and it should appear by the evidence that the distance from the consignee's home to the station should be such that but one load of coke could be hauled a day, and that a ton at a load was all that could be hauled, taking the condition of the roads into consideration, then according to appellant's contention, he would be entitled to hold the cars in question at that place, without charge, for more than a month. Such a rule would practically take out of business, under the supposed case, the rolling stock of a company for one-twelfth of the year, to the prejudice of other shippers and to the detriment of the public interests. The correct rule must be that the consignee shall have a reasonable time, after having knowledge of the arrival of his freight, to get the necessary help and means to remove the same; and it cannot be presumed that he is to do this by the employment of the fewest number of persons or teams that can be employed at such work, and at the same time have it said that any effort whatever is being made to remove the freight. No circumstance is shown here why a number of teams and abundance of help could not have been obtained, by proper effort, to have unloaded this coke within the forty-eight hours fixed by the rule, allowing for the Sunday; and if it could not, it cannot be maintained, as we think, that appellee should stand the loss of appellant's failure or inability to discharge his duty and perform his contract. Circumstances might arise, and doubtless will, in such cases, when, in

determining what shall be a reasonable time, many things are necessary to be taken into consideration, but the distance that the commodity is to be hauled when removed from the company's cars, it would seem, should not be one of them.

It is urged, further, that a lien ought not to be accorded common carriers in such cases, but they should be left to their action upon the case or in assumpsit. There is no law preventing the sale, by the consignee, of the cargo, at the point of destination, to one or many persons who may be wholly irresponsible and as against whom suits would be unavailing. The object of such a rule cannot be so much for the recovery of a revenue as the enforcement of a rule that is to the benefit of all the shippers, and thereby a public benefit. The charge must be said to be little more than normal, and yet the evidence discloses that its imposition in such cases has had a highly beneficial effect. No question is made as to the reasonableness of the charge, and if there were, it could have no effect in the case at bar, for the reason that appellant absolutely denies the right of appellee to any charge or compensation and made no tender of any portion of it. *Russell v. Koehler*, 66 Ill. 559; *Hoyt v. Sprague*, 61 Barb. 491; *Schouler on Bailments*, sec. 125.

The views above expressed as to the rule obtaining to such charges, whether regarded as storage charges or demurrage or car service, seems to be in keeping with the weight of the modern decisions upon the question, and, we believe, will tend to the public welfare.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

SECTION III. TICKETS.

HIBBARD v. NEW YORK AND ERIE RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1857.

[15 N. Y. 455.]

DENIO, C. J.¹ In my opinion, the learned judge before whom this case was tried committed two capital errors; First. He refused to charge the jury that the plaintiff was bound to conform to the rules and regulations of the company, by showing his ticket to the conductor when requested so to do. As a substitute for this direction, he charged that a passenger was bound to exhibit his ticket when reasonably requested; and he added that if the conductor knew the plaintiff had paid his fare he had no right to expel him from the cars, although he refused to show his ticket. The defendant was entitled to the instruction asked for without qualification.

¹ Part of this opinion and the concurring opinions of BROWN and COMSTOCK, JJ., are omitted. — ED.

It was proved that the defendant's company had established a regulation by which passengers were required to exhibit their tickets, when requested to do so by the conductor, and that in case of refusal they might be removed from the cars. If this was a reasonable regulation, the plaintiff was bound to submit to it, or he forfeited his right to be carried any further on the road. In my opinion the rule was reasonable and proper, and in no way oppressive or vexatious. In the first place, it was easy to be complied with. The railroad ticket is a small slip of paper or pasteboard, which may be conveniently carried about the person; and it involves no conceivable trouble for the passenger, when called upon at his seat by the conductor, to exhibit it to him. Then no one can question but that this or some similar arrangement is absolutely necessary for the company, unless they are willing to transport passengers free. A train of railroad cars frequently contains several hundred passengers, a portion of them constantly changing as the train passes stations where persons are received and discharged. The tickets, which are given as evidence of the payment of fare, are of as many different kinds as there are stopping places on the road; each being for the distance or to the place for which the passenger has paid his fare. The conductor must necessarily be a stranger to all or a large portion of his passengers. Unless he is allowed a sight of these evidences of the payment of fare, whenever he may require it, he is exposed to the chance of carrying the holder of them beyond the place to which he has paid, or of carrying persons who have not paid at all. If the conductor is not allowed to ascertain whether a passenger who has obtained a ticket still keeps it, there is nothing to prevent its being given to another passenger who has not procured one, and thus serving as a passport for several passengers. But it is argued that if the ticket has been once shown to a conductor, the passenger cannot reasonably be required to exhibit it a second time. If the duty of showing it were at all difficult or arduous, it might be a question whether the company would not be bound to devise some easier arrangement; or, if it was possible that the memory and other faculties of persons employed as conductors could be so cultivated that they could know and remember the persons of several hundred people, upon seeing them for the first time, and could, moreover, retain the recollection of the terms of the several tickets held by them upon their being once shown, it might be considered unreasonable to require a second exhibition of a ticket in any case. As this degree of perfection is unattainable in the present condition of mankind, I am of opinion that it was lawful, for this railroad company, to require that persons engaging passage in its cars should show their tickets whenever required by the company's servants intrusted with that duty, upon pain of being left to travel the remaining distance in some other way in case of refusal. I do not think it was correct for the judge to leave it to the jury, as he did, whether the request to show the ticket a second time was reasonable. The regulation required that it should be shown, when requested by the

conductor, and the question for the court to determine was, whether that regulation was lawful. (8 *Co.*, 126, *b.*) The judge would not pass upon that question, but submitted to the jury whether it was reasonable to require a conformity to it on the part of the plaintiff. There was no evidence tending to show that the conductor wished to vex the plaintiff, or put him to inconvenience. After the plaintiff had purchased his ticket and taken his seat, and had once exhibited the ticket, the train had stopped at a station (Wellsville), and had again started on its course. Then the conductor desired to see the ticket and was refused. He may not have been able to remember, if he knew that the plaintiff had paid fare and had a ticket, whether it was for Wellsville or for a place beyond that station; or he may not have remembered his person so as to be able to determine whether he got on at Wellsville, or had come from Hornellsville, or some place further west. True, Mr. Crandall informed the conductor that the plaintiff's fare was paid, and that he had a ticket, and Mr. Crandall may have been known to the conductor to be a truthful person, or he may have been an utter stranger. The company, however, had a test far more convenient to all concerned than the taking of testimony, to wit, the exhibition of their own ticket, which the plaintiff had in his pocket, but which he pertinaciously refused to show.

It is true, the judge put it to the jury to say whether the conductor knew that the plaintiff had paid his fare. Ordinarily the law would hold that what a person knows at one time he should be taken to know and remember at a short distance of time afterwards. The conductor had seen the plaintiff's ticket, and had some opportunity of studying its contents; and under this charge the jury would necessarily find for the plaintiff. The judge made no account of the peculiarity of the circumstances; of the number of persons the conductor would be obliged, in order to protect the company under this rule, to recognize and remember; of the divers kinds of tickets which must be used, and of the haste with which this business must necessarily be done. It was precisely in consideration of these circumstances that the rule was made, and that it was reasonable and therefore lawful. If the judge had submitted it to the jury whether the conductor knew and remembered that the plaintiff was travelling under a ticket which extended to the place where they then were, and whether his conduct in requiring a second sight of the ticket was caused by a desire to harass the plaintiff, the only objection, so far as I can now see, would have been that there was not the slightest evidence to raise such a question. But this was not the point submitted. It was, whether he knew that the plaintiff had paid; and as he had shortly before seen the authentic evidence of such payment, the jury would necessarily find, as they did, that he had such knowledge.

STANDISH v. NARRAGANSETT STEAMSHIP CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1873.

[111 Mass. 512.]

CHAPMAN, C. J. The jury having found a verdict for the plaintiff for \$50, he excepts to all the rulings of the judge who tried the cause, and to his refusals to rule.

1. He contends that it should not have been left to the jury to find whether the plaintiff knew he was to give up the boat ticket before leaving the boat, because there was no evidence whatever tending to prove such knowledge. But from the manner in which passengers purchase tickets, and the use necessary to be made of them, any person of ordinary intelligence would infer that they are to be given up on the boat to some officer, and as they had not been called for earlier, he would naturally suppose that they would be called for at the time of leaving the boat. Whether the plaintiff knew it was a question for the jury, under the circumstances of the case.

2. He contends that the defendants had no right forcibly to detain the plaintiff at all for the purpose of investigating on the spot the circumstances of the case. As passenger carriers the defendants had a right to make reasonable rules and regulations. It would be obviously reasonable to require passengers to purchase tickets at the office before the boat started, instead of taking money on board, and to give up these tickets at the end of the voyage while passengers were leaving the boat. If a passenger should attempt to leave without producing a ticket, and should allege that he had lost it, they would need to investigate the matter, and to ascertain the reason of his conduct, and to make reasonable provision for their own security. The ruling requested, that they had no right to detain him, even if he was fraudulently trying to get his passage without a ticket and without paying the fare, was properly refused. The ruling was proper that if the plaintiff lost his ticket it would be his own loss, and not one which the defendants were to bear; and it was sufficiently favorable to the plaintiff to rule "that they had no right to detain him till he did pay his fare or give up a ticket, or to compel him to pay his fare or give up a ticket; but that if he knew that he was to give up his ticket before leaving the boat, the defendants had a right, if he did not give it up or pay his fare, to detain him for a reasonable time to investigate on the spot the circumstances of his case; and if the jury found that the defendants detained him for the purpose of compelling him to pay his fare or to give up his ticket, or detained him for the purpose of investigating his case for an unreasonable time, or in an unreasonable way, he was entitled to recover." Under this ruling the jury found for the plaintiff. As he had sufficient money to pay his fare, as it was his duty to do, he himself was the unnecessary cause of his own detention for two hours, and the damages

found by the jury seem to be ample. Upon the ruling and verdict, the other points insisted upon in the plaintiff's brief become immaterial.

Exceptions overruled.

AUERBACH v. NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1882.

[89 N. Y. 281.]

EARL, J. This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger. He was nonsuited at the trial and the judgment entered upon the nonsuit was affirmed at the General Term. The material facts of the case are as follows: The plaintiff, being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis over the several railroads mentioned in coupons annexed to the ticket to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named on coupon attached;" that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that, if he failed to comply with such agreement, either of the companies might refuse to accept the ticket, or any coupons thereof, and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket and rode to Cincinnati, and there stopped a day. He then rode to Cleveland and staid there a few hours, and then rode on to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows:

"Issued by Ohio and Mississippi railway on account of New York Central and Hudson River railroad *one first-class passage, Buffalo to New York.*"

Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September, he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached, to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched

several times, until the plaintiff reached Hudson about three or four o'clock, A. M., September 27, when the conductor in charge of the train declined to recognize the ticket on the ground that the time had run out, and demanded three dollars fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit upon the ground that, although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket.

We are of opinion that the plaintiff was improperly nonsuited. The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company through the agent selling the ticket made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. (*Hutchinson on Carriers*, § 579; *Brooke v. The Grand Trunk Railway Co.*, 15 Mich. 332.)

But the plaintiff was bound to a continuous passage over the defendant's road, that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train, and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and then make it continuous. The language of the contract and the purpose which may be supposed to have influenced the making of it do not require a construction which would make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to secure a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff, having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract.

It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in such doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent. ANDREWS, Ch. J., concurring in result.

Judgment reversed.

SLEEPER v. PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA, 1882.

[100 Pa. 259.]

TRUNKEY, J. The parties agree that this case presents a single question, whether a person purchasing a ticket over the Pennsylvania railroad from New York to Philadelphia, from a ticket dealer who is not an authorized agent of the company, can maintain an action in the courts of this State for the refusal of the company to carry him between these points in return for said ticket.

By the Act of May 6th, 1863, P. L. 582, it is made the duty of every railroad company to provide each agent authorized to sell tickets entitling the holder to travel upon its road, with a certificate attested by the corporate seal and the signature of the officer whose name is signed to the tickets. And any person not possessed of such authority, who shall sell, barter, or transfer, for any consideration, the whole or any part of a ticket, or other evidence of the holder's title to travel on any railroad, shall be deemed guilty of a misdemeanor, and shall be liable to be punished by fine and imprisonment. The purchasing and

using a ticket from a person who has no authority to sell, is not made an offence.

That the plaintiff's ticket, on its face, entitled him to the rights of a passenger between the points named, is unquestioned. The only reason for denying him such right was that he bought from one who sold in violation of the statute in Pennsylvania. It is not said that the vendor in New York is actually guilty of the statutory offence, but that the defendant being a corporation in Pennsylvania, and the stipulated right of passage being partly in Pennsylvania, her courts will not enforce a contract resting upon acts which the legislature has declared criminal.

The presumption is that the ticket was properly issued by the company, and that the holder had the right to use it. Such tickets are evidence of the holder's title to travel on the railroad. Prior to the statute in Pennsylvania, it was lawful for holders to sell them.

The property in them passes by delivery. The Act of 1863 confers no right upon a railroad company to question passengers as to when, or where, or how they procured their tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company. At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed. No part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was a mere purchase of the obligation of a common carrier, to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the bona fide holder to performance, and for breach to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania, it is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, "this action is to enforce not the contract between the ticket-scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error."

The sale of the ticket to the plaintiff in New York was lawful. That being an executed contract, there is no question respecting its enforcement. Surely it is not an exception to the rule, that contracts, valid by the law of the place where they are made, are generally valid everywhere. Then, as the plaintiff has a valid title to the ticket, the contract between the defendant and himself is valid.

Judgment reversed and procedendo awarded.

CLARK *v.* WILMINGTON AND WELDON RAILROAD CO.

SUPREME COURT OF NORTH CAROLINA, 1884.

[91 N. C. 506.]

SMITH, C. J.¹ The plaintiff, while at Whitaker's station, on the defendant's road, awaiting the arrival of the train, on which he intended to take passage for Battleboro, a station four miles distant, and being himself without money, made arrangements with two others, Isaac Powell and T. P. Braswell, who were also going on same train, in which each agreed to pay his fare of twenty-five cents, the charge between those points.

When the train came, all three, with twenty or more others, entered it, the plaintiff taking a seat in the forward coach, Braswell in that next behind, and Powell in that where the plaintiff was, or one next in front.

When the conductor was passing through the coaches, taking up the tickets and collecting fares, from front to rear of the train, he came to the plaintiff, who said he had neither ticket nor money, but would get the fare, if allowed to go to the coach behind, from a gentleman sitting there.

The conductor refused to do so, saying, "you must get off. I have not time to wait for you. I have something else to do." The train was then about half way between the stations, moving at a rapid rate, when the conductor stopped the train and compelled the plaintiff to get out.

Braswell would have advanced the money and paid the fare upon application. As the plaintiff descended from the coach and was on the lowest step, Powell offered to pay the fare, but the conductor declined to receive it, saying, "you are too late, go and attend to your own business."

In expelling the plaintiff there was no actual force employed against his person, but the order was given, and assistants were present to execute it, and the plaintiff submitted.

The action is to recover damages for this ejectment of the plaintiff, and the sole question raised by the appeal is, whether under the circumstances the conductor had a right to put the plaintiff off the train.

An instruction was requested for the defendant, in the charge given to the jury, in these words:

"When the conductor demanded of the plaintiff his ticket, and he tendered neither ticket nor money, the conductor had the right to eject the plaintiff."

This was refused, and instead the jury were directed as follows:

"The conductor was not bound to go into the other car to get the fare from Braswell, but if Braswell had money and was ready and willing to pay the fare of the plaintiff, and plaintiff told him before he stopped the train and started to eject him that a friend in the next car

¹ The dissenting opinion of MERRIMON, J., is omitted. — ED.

would pay his fare, then the conductor ought to have allowed plaintiff a reasonable time to get the fare."

The whole controversy is involved in these two instructions, the one refused and the other given.

There can be no question of the right of the officer, in charge of a train of passenger coaches, to remove any one who has entered and refused to pay his fare or produce his ticket, as evidence of its having been paid to some authorized agent of the company, unless he is traveling with its permission without.

Such refusal, in opposition to the rules of the company, presents a case which warrants the officer in charge to require such intruder to leave the train, and if necessary, to use such force as is sufficient to accomplish his ejection. Nor, when the officer has stopped the train, and he is descending the steps and about to pass out, will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage, by such misconduct by breaking his own contract to pay when called on, and it is not regained by his repentance at the last moment, and after he has caused the inconvenience and delay to the company by his wrongful act. The adjudications fully recognize this authority in the carrier, and it is necessary to prevent imposition upon it. Aug. on Carr. § 609, note A; Thomp. Carr. Pass. 340, note 5.

Where there has been no refusal to pay the fare and the obligation not disputed, but for some reason, such as the mislaying of the ticket, or loss of pocketbook in which the money is kept, or other adequate cause which prevents a prompt response to the conductor's demand, it is but reasonable that an opportunity should be allowed the passenger to search for what is mislaid or lost, or to provide other means of payment, where the delay does not interfere with the regular duties of the officer in charge.

The delay in the present case would have been momentary, if indeed any had been occasioned, in permitting the plaintiff to precede the conductor in passing into the next coach and getting the money in time for the call on Braswell or before Braswell had been reached. Instead of complying with this request, made in good faith, the conductor arbitrarily and instantly rang the bell and expelled the plaintiff, producing an interruption in the movement of the train that would have been rendered unnecessary if a brief time had been given to the plaintiff to get the money promised him.

This was a harsh exercise of power, injurious to the plaintiff and needless in the protection of the interests of the company.

The cases that uphold the right of the carrier company summarily to expel from its train a passenger who does not produce his ticket or pay when called on, as required by its regulations, are all, so far as we have examined, cases of a denial of the right to demand the fare, or a refusal to pay it upon some untenable ground, so that the conductor must submit or enforce his authority against the resisting passenger and prevent his riding unless he does pay.

The facts of this case do not bring it under the operation of the rule applicable to those who persistently and wrongfully resist the demand of the conductor, acting under directions of his principal and within the sphere of his necessary powers, for the plaintiff acquiesced in the demand of his fare, and merely proposed to pass into an adjoining car to obtain the money, promised under a previous arrangement with a fellow passenger.

This view of the relations between the carrier and passenger is sustained by recent decisions.

In *Maples v. N. Y. & N. H. R. R. Co.*, 38 Conn. 557, the plaintiff had mislaid his commutation ticket, and could not at the moment when called on by the conductor, produce it, as he was, by the regulations of the company and the conditions of the issue of such ticket, required to do, while the conductor knew he had one and that the time limited therein had not expired. The conductor, regardless of the explanation and following the letter of his instructions, demanded the fare, and it not being paid, forced the plaintiff to leave the train. For this expulsion the plaintiff sued, and PARK, J., delivering the opinion in the supreme court, thus declares the law:

“The plaintiff was entitled to a reasonable time to find it (the ticket). The contract requires him to show his ticket to the conductor, but he was not bound to do so immediately when required. . . . Under such circumstances the plaintiff was entitled to ride as long as there was any reasonable expectation of finding it during the trip.”

In *Hayes v. N. Y. Cen. Railroad Co.*, decided in the supreme court at the general term held in October last, reported in vol. 30, No. 24, Alb. Law Journal of December 13th, 1884, the plaintiff had a ticket but failed to find and exhibit it to the conductor when called on; whereupon the bell was rung, the train stopped, and the plaintiff required to leave. Before the train came to a halt the plaintiff found his ticket and offered it to the conductor, who nevertheless compelled him to get off.

The court say, MERWIN, J., speaking for all the members: “If the ticket of the plaintiff was mislaid, and he in good faith was trying to find it, he was entitled to reasonable time to enable him to do so, if he could, and if in case of failure to find it, after such reasonable opportunity, he was willing and ready to pay his fare, the conductor had no right to put him off.” See *Railroad v. Garrett*, 8 Lea (Tenn.), 438.

It is contended however that the short distance to be run over by the train before reaching the station at which the plaintiff was to debark did not admit of delay and rendered necessary prompt action on the part of the conductor, and it was the plaintiff's own fault to enter the coach without a ticket or the means of payment when the fare was required of him.

It does not appear in the case that prepayment of fare was necessary, and it is obvious that no appreciable time would have been lost in giving the plaintiff opportunity to call on Braswell and get the money to

pay his fare. If this were a mere pretence, and such seems to have been the assumption on which this precipitate action of the officer was taken, a moment would have revealed it, and then the ejection would have been fully warranted.

The defence set up is an assertion of the right to remove from a train any passenger who may not be ready at once to exhibit a ticket or pay his fare, notwithstanding he has the means at command by passing into an adjoining coach, and only asks time to do so. This rigid rule enforced would require every one to have possession of his own ticket, or the friend who has it to be near by, at the hazard of expulsion, if he did not.

In all cases a reasonable indulgence should be shown a passenger in his effort to comply with the rules of the company, and what is reasonable must be determined in connection with surrounding circumstances and in view of the facts of each case.

We think the plaintiff's request was reasonable, and that the hasty and precipitate action of the conductor was in excess of the authority with which the law armed him.

The exceptions to the evidence are not tenable, for its only office was to show that the plaintiff had provided means to pay his fare, and did not intend to trespass upon the rights of the company.

In some of the States the right to eject for non-payment is restricted, so far as to require it to be at some station and not capriciously at any point, which might be at some very inhospitable spot endangering health if not life.

There is no error and the judgment must be affirmed.

FRANK *v.* INGALLS.

SUPREME COURT OF OHIO, 1885.

[41 *Ohio St.* 560.]

NASH, J. The plaintiff in error seeks to have the judgment of the district court reversed on the theory that a railroad passenger ticket, like those described in the statement of facts, is negotiable and passes by delivery from the holder to a purchaser, and that any person purchasing and receiving such ticket from any holder thereof takes it freed of all equities of the railroad company, or defects of title, or want of authority in the seller to dispose of it.

The character of a railroad passenger ticket has been considered by the Supreme Court of this State. In the case of *C. C. & C. R. R. Co. v. Bartram*, 11 *Ohio St.* 457, it is spoken of as "a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place therein designated." Again, in the case of *Railroad Company v. Campbell*, 36 *Ohio St.* 647, it is said that a railroad ticket "is simply a voucher that the person in whose possession it is, has paid his fare." Lawson, in his work on "Contracts

of Carriers," § 106, p. 116, says "that a railroad or steamboat ticket is nothing more than a mere voucher that the party to whom it is given, and in whose possession it is, has paid his fare and is entitled to be carried a certain distance," and supports his definition by the citation of numerous decisions.

It thus seems to be well established that a railroad ticket is a receipt or voucher. It has more the character of personal property than that of a negotiable instrument. When the possession of such a ticket has been obtained by fraud the company has parted with the possession of it, but not with the title to it, and the person purchasing from the holder, although for value and without notice of equities, takes no better title than the party had who fraudulently obtained possession of it. We do not perceive that the holder of such a ticket is in any better position than the *bona fide* purchaser of goods from one in possession, for a valuable consideration, and without further notice of any defect in his vendor's title. Such a purchaser cannot be protected against the title of the true owner in a case where the vendor had fraudulently obtained his possession and without the knowledge or consent of the owner, although previous to such possession he had, by false and fraudulent representations, induced the owner to enter into a contract for the sale of the goods. *Dean v. Yates*, 22 Ohio St. 388; *Hamet v. Letcher*, 37 Ohio St. 356.

From the facts found by the court below it appears that the possession of the tickets in controversy were obtained from Ingalls, receiver of the railroad company, by the fraud of Fordyce, and we conclude that Frank, the purchaser from Fordyce, obtained no title thereto.

Eagan, the agent of the receiver, authorized to sell such tickets, and stamp and deliver the same upon receiving pay therefor, did not bind his principal when he stamped and delivered the tickets, without his knowledge or consent, to a third person, to be sold by him, and to be paid for when sold.

Judgment affirmed.

PENNSYLVANIA RAILROAD CO. v. PARRY.

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1893.

[55 *N. J. Law*, 551.]

THE plaintiff below, Howard Parry, on the 22d of December, 1890, purchased an excursion ticket from Riverton, where he lived, to Mount Holly, both places being in Burlington county. Riverton is on the main line of the Pennsylvania Railroad Company between Trenton and Camden, and Mount Holly is upon a branch line, called the "Burlington Branch."

The ticket purchased by Parry indicated that his route was to be "via Burlington Branch," and that the ticket was "not good to stop off *en route*." The regulations of the Pennsylvania Railroad Company required that passengers holding such tickets, in going from

Riverton to Mount Holly and returning, should change cars at its Broad street station, in the city of Burlington, into which station the trains, both of the branch and the main lines of its railroad, ran.

Upon returning from Mount Holly, in the afternoon of the day named, Parry took a train that left Mount Holly at thirty-eight minutes after four o'clock, and should, according to the company's regulations, connect at the Broad street station with a train which would leave Trenton at twenty minutes after five o'clock. That connection required passengers destined for Riverton, to wait at the Broad street station, a half hour or more, for the arrival of the train from Trenton. On the day in question, the train which Parry took at Mount Holly, reached the end of the branch line, at the city of Burlington, and came to a stop upon the Y track, which connected with the main line, about half a mile from the Broad street station, and there waited, to allow a belated train, upon the main line, to pass before it into the Broad street depot. That train was a local accommodation, scheduled to stop at Riverton, but was not one of the connecting trains with Mount Holly. With a view to saving the half hour's delay at the Broad street station, in waiting for the proper connecting train, Parry and a friend got off the train from Mount Holly, while it stood on the Y track, and, walking the half mile to the Broad street station, reached it in time to catch the belated train, which would stop at Riverton. Upon that train Parry presented the return half of his excursion ticket, and was informed that it was good only on trains which connected with the Burlington branch railroad at the Broad street station, according to the regulations of the company, and that, as the train he was on did not make such connection, the ticket was not good upon it. Parry refused to pay his fare and was put off the train at a way station, before Riverton was reached, without unnecessary force or indignity.

Upon the appearance of the above-stated facts, in the case made by the plaintiff below, the defendant moved for a nonsuit, and, upon the denial of that motion, error is, among other things, now assigned.

THE CHANCELLOR. The motion to nonsuit presented to the court below this question, whether the contract between Mr. Parry and the railroad company permitted Mr. Parry to quit the branch road train before it reached its destination, and, proceeding in advance of it, continue his journey in a train with which it did not connect and was made available to him only by accidental delay.

It is established, by the course of judicial decision, that when a person, who purchases a railway ticket to a certain place, takes his seat in a particular train that goes to his destination, he cannot, without permission of the railway company, while the train is reasonably pursuing the duty of the carrier, leave it and take another train and complete his journey under the same contract. The reason is that his contract is entire, and neither he nor the company can be required to perform it in fragments. *State v. Overton*, 4 Zab. 435; *Petrie v. Pennsylvania Railroad Co.*, 13 Vroom, 449; *Cheney v. The Boston and*

Maine Railroad Co., 11 Mete. 121; Dietrich v. Pennsylvania Railroad Co., 71 Pa. St. 432; The Oil Creek and Allegheny River Railway Co. v. Clark, 72 Id. 231; Vankirk v. Pennsylvania Railroad Co., 76 Id. 73; Hamilton v. New York Central Railroad Co., 51 N. Y. 100; Wyman v. Northern Pacific Railroad Co., 34 Minn. 210; McClure v. Philadelphia, Wilmington and Baltimore Railroad Co., 34 Md. 532; Stone v. Chicago and Northwestern Railway Co., 47 Iowa, 82; Churchill v. Chicago and Alton Railroad Co., 67 Ill. 390; Cleveland, Columbus and Cincinnati Railroad Co. v. Bartram, 11 Ohio St. 457; Hatten v. Railroad Co., 39 Id. 375; Wilsey v. Louisville and Nashville Railroad Co., 83 Ky. 511.

It is not necessary that the contract of carriage should be fully set out in the passenger's ticket. The ticket is a mere token that the fare has been paid, and that the passenger has the right to be carried to the destination it indicates, according to the reasonable regulations of the railway company. Such regulations, at least so far as they are known to the passenger, enter into the contract of passage, and it is the duty of the passenger to conform to them.

The proofs of the plaintiff below very clearly exhibited that Mr. Parry was familiar with the regulations under which the defendant company was accustomed to transport passengers between Riverton and Mount Holly, upon such tickets as the one he purchased. He admits that he knew that the local accommodation train was apt to be belated, and that the train upon the branch road did not connect with it, and hence that the latter train would not continue to the Broad street station in Burlington until the former had passed, and that it was possible occasionally to catch it, by quitting the branch road train while it was waiting upon the Y and walking a half mile to the Broad street depot. Indeed, it was his accurate knowledge of the regulations of the company, and the delay they occasioned, that prompted him to disregard them when he saw an opportunity to expedite his transit.

He states that he could have purchased an excursion ticket from Riverton to Burlington and back, and another from Burlington to Mount Holly and return, for the same price that he paid for the single excursion ticket from Riverton to Mount Holly and return, and in that way have secured the undoubted right to return by the local accommodation if he could have caught it. But he did not purchase the two excursion tickets and make his contract in that way. He chose rather to buy the single ticket, which expressly provided that he should be transported between the terminal points of his journey "via Burlington Branch," and subjected him to the regulations that he should be carried to the Broad street station and there change to the cars of a connecting train.

Under authority of the rule referred to, even in absence of the express notice upon his ticket that he should not "stop off *en route*" after he had once started in a train, it may be questionable whether it would not have been an abandonment of his contract if he had left the

train, while it was duly performing its duty, at any other point than that which the regulations designated for that purpose. The notice upon the ticket simply served to call attention to that rule. But in deciding this case it is not necessary to determine that question. The additional fact that, with the express notice which the ticket gave before him, he quit the branch train with the deliberate intention of not again taking either it or its connecting train, appears, and in light of such fact his non-conformity to the regulations which entered into his contract, and consequent infraction of that contract and abandonment of his rights thereunder, become too conspicuous to admit of doubt.

There was nothing in the evidence to indicate that the regulations of the defendant company were not reasonable, and it is admitted that the train abandoned was pursuing its way as those regulations required.

Under these conditions the conductor was justified in demanding a new fare, and, upon the refusal of Mr. Parry to pay it, to remove him from the train in the manner that was adopted. *State v. Overton, supra.*

It is our conclusion that the plaintiff below should have been nonsuited, and hence that the judgment now reviewed must be reversed.

MAGEE, J. (dissenting). Parry held a return ticket, which expressed the contract of the railroad company to carry him from Mount Holly to Riverton, "via Burlington Branch." There was no condition in the contract that he should take a continuous train, and there was no such train. Nor was there in it any condition that he should take a connecting train, and, strictly speaking, there was no connecting train with that on which he rode from Mount Holly to Burlington. Passengers by that train were obliged to wait in Burlington for a considerable time before, in ordinary course, a train left for Riverton.

The only condition of the contract affecting Parry was that forbidding him to "*stop off en route.*"

Had the train which brought Parry from Mount Holly moved on to the station in Burlington, he would have been obliged to alight, and, in the absence of stipulations to the contrary, could take the next train on the main line to Riverton, even though that train was a belated train not usually running at that time.

But the train which brought Parry from Mount Holly had, in fact, passed over the branch road and arrived at the main line at the junction. When Parry alighted there he, perhaps, forfeited his right to be carried to the station, but, by such alighting and walking the short distance to the station, he did not forfeit his right to be carried from there to Riverton, unless his act was a stopping off *en route*.

Whether Parry's conduct violated that condition depended on whether he acted with intent to break the continuity of his journey. That was a question for the jury, and it was properly left to them.

Finding no error, I shall vote to affirm.

CHENEY v. BOSTON AND MAINE RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1846.

[11 Met. 121.]

ASSUMPSIT for money had and received, and for breach of a contract by the defendants in not carrying the plaintiff, upon their road, from Durham (N. H.) to Boston. The case was submitted to the court of common pleas, upon the following statement of facts.

"The plaintiff, in May 1844, purchased tickets at the depot of the defendants' road at Durham, for a passage for himself and his wife, from Durham to Boston, and paid for said tickets \$1.87½ each. It was and is a rule of the defendants, that passengers purchasing tickets for a passage on said road, from one place to another, must go through in the same train of cars; but the plaintiff did not know of this rule at the time of purchasing said tickets, and he got into the cars with the intention of stopping, with his wife, at Exeter, between Durham and Boston, and about twelve miles from Durham, and of going on to Boston in the next train. The plaintiff was informed of the defendants' rule aforesaid when he came to take his tickets, and checks were given him in lieu of the tickets, upon which were the words 'good for this trip only.' The conductor offered him back the money which he had given for his tickets, deducting the amount of his fare from Durham to Exeter, which the plaintiff refused to accept, but demanded back his tickets in exchange for his checks. Twelve and a half cents less is charged by the defendants for each ticket from Durham to Boston, than for separate tickets from Durham to Exeter, and from Exeter to Boston. But this fact was not known by the plaintiff. The plaintiff and his wife stopped at Exeter, and went on to Boston on the same day, in the next train, and he offered his checks, which were refused, and he was obliged to pay \$1.50 each for tickets from Exeter to Boston."

The parties agreed that if the plaintiff was entitled to recover, on these facts, judgment should be rendered for him for \$20 damages, and costs. The court of common pleas rendered judgment for the plaintiff, from which the defendants appealed.

DEWEY, J. This case involves no question of the general duty of railroad companies to carry passengers who offer themselves and are ready to pay the usual rate of fare. It is only a question whether one who purchases a ticket, entitling him, by the rules of the company regulating the tariff of fares, to a continuous passage through, and avails himself of the reduction in price allowed to such passengers, can insist upon being taken up as a way passenger, at such stations as he may elect to stop at, he having voluntarily abandoned the train that went through.

The question really is, what was the contract between the plaintiff and defendants. Now the case stated by the parties expressly finds that the price of tickets entitling the party to a passage in the cars

from Durham to Boston, in one continuous passage, was \$1.87½ for each, and for a passage from Durham to Exeter, and from Exeter to Boston, as separate trips, \$2. Such was the regular and ordinary charge. It is true that the tickets themselves do not describe the passage to be one by the same train. Nor do they purport to entitle the holder to a conveyance by two separate trips, first by taking the cars to Exeter, and thence by a subsequent train passing from Exeter to Boston. They are silent as to the mode. It therefore was a contract to carry in the usual manner in which passengers are carried who have tickets of that kind.

It is said that the rules of the company were unknown to the plaintiff when he purchased the tickets, and therefore he ought not to be affected by them. This might very properly be insisted upon in his behalf, if it were attempted to charge him with any liability created by such rules; especially if it were attempted to enforce any claim for damages by reason of them.

The question, as to the right of the plaintiff to be transported as a passenger, does not depend upon his knowledge, at the time of the purchase of his ticket, of the difference of the price to be paid for a passage through the whole distance by one train, or that of a passage by different trains. The plaintiff might have inquired and informed himself as to that. If he did not, he took the mode of conveyance, the price of the ticket, and the superscription thereon, secured to him under the rules and regulations of the company. It appears, however, that before reaching Exeter, the plaintiff was fully apprised of the different rates of fare, and the rules applicable to way passengers, and that the agent of the defendants, the conductor of the train, offered to refund to him the money that he had paid for his ticket, deducting the usual fare from Durham to Exeter, which the plaintiff refused to accept. In the opinion of the court, this was all that the defendants were required to do; and as the plaintiff declined this offer, and thereupon left the train, stopping at Exeter, he voluntarily relinquished his passage through by a continuous train, for which he held a ticket, and whatever loss he has sustained was occasioned by his own act, and occurred under such circumstances as preclude him from all claim for damages for any default in the company in the matter. Nor can he sustain any legal claim to recover back the sum paid for his first ticket, or any part thereof. The offer to that effect was refused by him.

Judgment for the defendants.

KEELEY v. BOSTON AND MAINE RAILROAD CO.

SUPREME JUDICIAL COURT OF MAINE, 1878.

[67 Me. 163.]

PETERS, J. This case presents this question: Does a railroad ticket, with the words "Portland to Boston" imprinted on it, purchased in Portland under no contract other than what is inferable from the ticket itself, entitle the holder to a passage, on the road of the company issuing it, from Boston to Portland? Does a ticket one way give the right to pass the other way instead? We find no case deciding that it does, nor do we assent to the proposition that the law should be considered to be so. Such is not the contract which the ticket is evidence of.

It has been held that, if a passenger purchases a ticket with a notice upon it that it is "good for one day only," in the absence of a statutory regulation to the contrary, he can travel upon such ticket only on that day. *State v. Campbell*, 32 N. J. L. 309. *Shedd v. Troy & Boston Railroad*, 40 Vt. 88. *Johnson v. Concord Railroad*, 46 N. H. 213. *Boston and Lowell R. R. Co. v. Proctor*, 1 Allen, 267. 1 Redf. on Railways, 99, and notes. It has been held also that, if the words "good upon one train only" are printed upon a ticket, the holder is not entitled to change from one train to another after the passage is begun. *Cheney v. Boston & Maine R. R. Co.*, 11 Met. 121. Redf. on Railways, *supra*. If such notices confine a passenger to a certain day and a particular train, why is there not as much reason to say in this case that the notice upon the ticket must restrict the holder of it to go in the particular direction named?

This position is not weakened by the suggestion that the company can transport the passenger as cheaply and easily one way as the other. If it were so, it would be no answer. A person who agrees to sell to another, merchandise of one kind, might find it to his profit and advantage to deliver merchandise of another kind, but he cannot be compelled to do so.

So a railroad could often, no doubt, transport a passenger as conveniently on one train as another and on one day as another; still, as before seen, there is no obligation to do so. But it does not follow that a railroad corporation can carry passengers as well for itself the one way as the other. There may be a difference arising from various considerations. There may be more travellers and more freight to be carried one way than the other. It may be more expensive. There may be more risk in the one passage than the other. The up train may go more by daylight and the down train more by night. That such considerations as these might arise in a case, whether in this instance they exist or not, helps to demonstrate that a ticket one way is a different thing from a ticket the other. Practically, the doctrine set up by the plaintiff, if allowed to prevail, would affect the defend-

ants injuriously. It is well known that through tickets are cheaper *pro rata* than the way or local fares. This fact has led to a practice on the part of way travellers of buying through tickets and using them over a part of the route and selling them for the balance of the distance, so as to make a saving from the regular prices charged. It is easily seen that, if a passenger is permitted to ride in either direction on a ticket, it increases the chances for carrying on this sort of speculation against the interests of the road.

It does not avail the argument for the plaintiff at all, that before this he had passed over the road upon other tickets in a direction the reverse of that advertised upon their face; nor is it of any importance that another conductor upon another train at another time expressed an opinion to him that this ticket would be for either direction good. The contract is not shorn of a particular stipulation merely because it is not always enforced. Nor could such conductor in such manner bind the corporation, and it could not have been understood by the plaintiff that he undertook to do so. The conductor merely expressed an opinion about a matter which he at that time had no business with. The plaintiff had ample opportunity to purchase another ticket, and should have done so. *Wakefield v. South Boston Railroad*, 117 Mass. 544.

Plaintiff nonsuit.

JOHNSON v. PHILADELPHIA, WILMINGTON AND
BALTIMORE RAILROAD CO.

COURT OF APPEALS OF MARYLAND, 1884.

[63 Md. 106.]

MILLER, J. This suit was brought by the appellant against the appellee to recover damages for having been wrongfully ejected from its cars. The declaration alleges that on the 22nd of May, 1883, the plaintiff purchased from the defendant an excursion ticket from Elkton to Philadelphia and return, whereby the defendant became bound to carry him safely over its road on this trip, and treat him civilly and properly, but the defendant had rude and incompetent servants on the train and in charge thereof, who refused to allow him to ride on its road, dragged him from his seat, expelled him from the train, and other wrongs to the plaintiff then and there did.

Instead of meeting this simple case with the plea of *non cul.* and trying it upon issue joined on that plea, the docket entries show there were an extraordinary number of special pleas and replications, a part of which only are contained in the record. It contains only *four* lengthy pleas, and *five* similar replications, to which numbers they had been reduced by the withdrawal of the others, there having been originally eight pleas and many more replications. The Court overruled the demurrers to these four pleas, sustained the demurrers to the five replications, and gave judgment for the defendant, from which the plaintiff

has taken this appeal. From this we infer, though it is not so stated in the record, that the plaintiff did not wish to amend or answer over, and was willing that final judgment should be given for the defendant, relying upon the success of his effort to reverse the ruling of the Court upon these demurrers. It is therefore our duty to pass upon the sufficiency of these pleadings, but before examining them, it becomes important to ascertain the rights and obligations of the plaintiff under the ticket which he purchased.

This ticket is set out *verbatim* twice in the pleas and once in the replications, and it consists of two connected parts, on the first of which there are printed, below the name of the defendant the terms "Excursion. Elkton to Philadelphia. Subject to conditions named in contract. Not good to stop off," and on the second, also below the name of the defendant, the terms. "Three days' excursion—return coupon. Philadelphia to Elkton;" and then follows this contract: "In consideration of the reduced rate at which this ticket is sold, it is agreed that it shall be used within three days, including the day of sale, as stamped on the back, for a continuous trip only, and by its acceptance the purchaser becomes a party to, and binds himself to a compliance with these conditions. It is not transferable nor good to stop off."

We find no difficulty in construing this contract. The conditions that the ticket shall be used "for a continuous trip only," and is "not good to stop off," mean that a purchaser who accepts and uses it, is bound to take a train which will carry him continuously through from one city to the other, both in going and returning, and not to stop off at an intermediate station while going either way, and the obligation of the company is to carry him safely, and to furnish trains which will thus carry him continuously from one place to the other. In *Pennington v. Phil., Wil. & Balto. R. R. Co.*, 62 Md. 95, the party attempted to use the return coupon of a similar ticket after the expiration of three days, and it was held that the limitation as to time was good and binding upon him, notwithstanding there was proof that he never read the ticket, and that the agent who sold it to him, told him it was "good until used." In that case we decided that where a ticket is sold at less than the usual rates, on certain conditions as to its use, if the purchaser accepts and uses it, he makes a contract with the company, according to the terms stated, and the reduction in the fare is the consideration for his contract; and that after he has availed himself of this reduction by using the ticket to make the trip one way, it is too late for him on his return to allege that he did not know on what terms the reduction was made, when he had ample opportunity of learning them from the ticket in his possession. According to the law just stated, the plaintiff was bound to observe all the conditions expressed on the face of his ticket, and could not hold the defendant to any other terms than those thus stated; and this being so, there is not much difficulty in disposing of these pleadings.

The substantial averments of the pleas are that the plaintiff purchased and accepted this ticket, and on the same day took passage on a train which carried him directly through from Elkton to Philadelphia, and on this side gave up to the conductor the first part of his ticket; that on the next day at Philadelphia, he got on a train which did not run as far as Elkton, and was only intended and advertised to run to Wilmington, all of which he well knew at and before the time he entered said train; that he moreover entered this train with the purpose and intention not to make a continuous trip to Elkton, but to stop off at an intermediate station; that after the train had started and before it had reached South Street Station in Philadelphia, the plaintiff, on demand of the conductor, showed him for his passage the return coupon of this excursion ticket, and announced his intention not to make a continuous trip to Elkton but to stop off at an intermediate station and to use this coupon for that purpose; that the conductor thereupon informed him that this coupon was not good for that train which ran only to Wilmington, nor for the purpose of stopping off, and told him he must pay his fare or produce a proper ticket to the station he intended to stop at, which he refused to do; that the conductor then told him if he would neither pay his fare nor produce a proper ticket he must leave the train at South Street Station, and when the conductor gently laid hands upon him to remove him at that station he resisted violently, rendering it necessary for other agents to be called to assist the conductor, and they put him off, using no more force than was absolutely necessary to overcome his resistance and effect his removal. Now in view of what we have already said as to the binding effect of the conditions attached to this ticket, it is plain that the facts thus stated in these pleas, afford a complete defence to the case made by the declaration. The question then is, do the replications set out a sufficient answer to this defence?

These replications fail to traverse any of the facts stated in the pleas, and the plaintiff is therefore held to the admission that they are true, under the rule that every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse. Stephen's Pl., 216. The only answer to these admitted facts, made by the replications and relied on by the appellant's counsel in their brief, is what is stated in two of them, and this, as to the first, is substantially as follows: That the defendant had established at its Broad Street Station in Philadelphia, a system for the management of its passenger traffic by which passengers were not allowed to act on their own judgment in getting on the cars, but the defendant itself undertook by means of its agents called gate-keepers, to assign passengers holding tickets to the proper train; that plaintiff, wishing to return towards Elkton to Chester, a station on defendant's road between Philadelphia and Wilmington, went to one of these gate-keepers who examined his ticket and negligently assigned him to the wrong train. The other states substantially the same facts and alleges that it was

the duty of the gate-keepers to inspect the tickets of all passengers, and in case a passenger held a ticket which the agent believed entitled him to a ride on the train about to be despatched, to admit such person through the gate and into the train as a passenger thereon; that the gate-keeper inspected plaintiff's ticket, and believing him entitled to ride on the train then about to be despatched, admitted him into said train as a passenger thereon.

This is all that the plaintiff has to set up as an excuse for violating his contract with the defendant company by getting on to a train, which he knew at and before the time he boarded it, did not run through to Elkton, and with the purpose and intention of stopping off at an intermediate station. All that need be said of such an excuse is, that, while it is similar, it is not so strong, as that which was relied on without avail in Pennington's Case. There the agent who sold the ticket told the plaintiff that it was "good until used," and to that our reply was, that there was no evidence that the ticket-agent was authorized to make, or to vary the terms of, *contracts* for the company, and our reply here is, that there is no averment in these replications that the gate-keepers had any such authority or power. In that case there was proof that the plaintiff did not actually read his ticket, but there is no averment to that effect in behalf of the plaintiff in this case, and it would not have availed him if he had made it. He cannot get rid of the conditions of his contract by saying that he relied upon the actual or implied direction to take this train which was given, either through the *belief* of the gate-keeper that the ticket was good for the train, or through his negligence, ignorance, or mistake. The contract could not be varied by any such direction. He knew, or was in law presumed to know, what the contract was, and he boarded a train which he knew would not take him to Elkton, and that too with the deliberate purpose of violating another condition of his contract by stopping off at Chester; and we have no difficulty in deciding that the conductor properly ejected him from a train upon which he had no right to be, except upon the condition of paying his fare to the place he intended to stop at. The Court was clearly right in sustaining the demurrer to these replications, and the judgment must be affirmed.

Judgment affirmed.

WILSEY v. LOUISVILLE AND NASHVILLE RAILROAD CO.

COURT OF APPEALS OF KENTUCKY, 1886.

[83 Ky. 511.]

HOLT, J. This action is for an alleged trespass, committed upon the appellant, Wilsey, by a conductor of the appellee in ejecting him from its train, upon which he was a passenger. It appears that on October 25, 1883, he purchased at full rate a ticket without any condition or limitation upon its face, or any coupon attached to it, over

the appellee's road from Danville Junction to London; and upon the same day he took passage upon it, the train arriving at Mt. Vernon between six and seven o'clock in the evening, where it was detained by a wreck upon appellee's road between that place and London until four o'clock the next morning, when it proceeded upon its trip. When it stopped at Mt. Vernon, the appellant was told the cause of it by the train officers, and upon inquiry of them, he was informed that it was uncertain how long the train would be detained, but at least for several hours. He was sick, and so informed them. The conductor having already taken up his ticket, and given him a check in lieu of it, he applied to him for a stop-over ticket, in order that he might leave the train and lodge for the night at a hotel. The conductor informed him that he could not give it, and he was also informed, either by the same officer or the baggage-master, that he could not travel upon any other train upon the conductor's check. He, however, went to a hotel for the night, and, so far as the record shows, had no knowledge of the time when the train proceeded on its trip. The next morning he boarded another passenger train for London, and when it had gone about two or three miles the conductor called for his ticket, and as he did so, he took from the appellant's hat the conductor's check that had been given him upon the other train, and tore it up, after being informed that the appellant had paid his fare from the Junction to London, but before the latter had time to offer any explanation.

When he did so, however, that officer required him to pay his fare from Mt. Vernon to London, and upon his refusal to do so prepared to eject him from the train. He then said that he would pay it, and inquired the rate of ticket fare and conductor's fare, and was told by that officer that the first was eighty-five cents and the latter one dollar and five cents, as the conductor testifies, and which sum was, in fact, the conductor's true rate of fare under the rules of the company; but the appellant, as well as a witness introduced by the company, says that he said it was one dollar and fifteen cents. The appellant thereupon handed him eighty-five cents, and after counting it, he demanded, as he says, twenty cents more, while the other witnesses testify, and the appellee's answer admits, that it was thirty cents. The appellant refused to pay the fare demanded, and the conductor then returned him the eighty-five cents and ejected him from the train.

The judgment appealed from is one of non-suit, it having been ordered by the court after both parties had offered their testimony. The action was in tort for damages. The averments of the petition and answer at least put in issue whether the appellant voluntarily left the train, and what was the full and established rate of fare. The lower court, therefore, improperly held that the burden was upon the appellee; and it therefore offered its testimony first. The appellant then introduced his evidence, and the motion for a non-suit was then made. This was a somewhat novel practice. Usually the defendant moves for a peremptory instruction upon the plaintiff's evidence alone; or he may

mingle record or undisputed written evidence with it, and then do so; and we in fact see no reason why, when all of the evidence has been heard, the court may not direct the jury to find for the defendant, if *all* of it be in his favor.

Only a question of law is then presented. After the introduction of contradictory evidence, however, the jury have a right to weigh it, and the cause cannot be withdrawn from them by a demurrer to the evidence.

The testimony was conflicting in this case as to the amount of fare demanded of the appellant by the conductor. If he demanded more than the usual rate and that fixed by the company, then it was an illegal demand with which the appellant was not bound to comply, and the appellee had no right by reason of the refusal to eject him from the train. But in front of this is a legal question of more importance. A railroad company has an undoubted right to prescribe such regulations as are suitable to enable it to execute its important duties.

The exercise of this power is necessary in order that it may both provide for the safety and comfort of its passengers and protect itself from imposition. Reasonable regulations looking to these ends should be upheld, because the security of the travelling public and the interest of the railroad so require. For instance, a higher rate may be collected of passengers who pay their fare upon the train than of those who purchase tickets before entering the cars. This discrimination is allowed, because it tends to convenience in the transaction of the business, and to the proper accountability of the company's agents. But it must be general or uniform as to the public, and be carried out in good faith by the railroad corporation, accompanied with a reasonable opportunity for those who desire to do so to purchase tickets before entering the cars. If they do not avail themselves of the privilege, then they are at fault and must pay conductor's fare. Such a rule affords proper checks upon the accounting officers of the railroad, and protects it in a reasonable manner against possible fraud and dishonesty. (*Hilliard v. Gould*, 34 N. H. 230; *Stephen v. Smith, &c.* 29 Vt. 160; *State v. Chovin*, 7 Iowa, 204; *Railroad Co. v. South*, 43 Ill. 176.)

It is also well settled, that when a passenger who holds a ticket from one point to another, selects his train, and enters upon his journey, that he has no right in law to leave it at a way station, and afterward enter another train of the company, and proceed to his destination without procuring a ticket, or paying his fare from the way station. His ticket is the symbol of the contract between him and the company, the relative duties of the parties under it being for the most part implied. The contract, however, is an entirety and indivisible.

By it the company undertakes to carry the holder between the places indicated by the ticket as one entire service for the whole distance and not by broken journeys. He is bound by his ticket contract to proceed directly to his destination when he has once made his election as to the time and means of going, and has called upon the carrier for perfor-

mance, and the parties have mutually entered upon the performance of the contract. If the company sees fit to give him a lay-over ticket, it is as a mere accommodation, and not by reason of any legal obligation. If, therefore, he leaves the train upon which he starts, he commits a breach of the contract and ends it; and when he starts upon another train he begins a new journey, and must check his baggage anew. The reasons for this regulation are obvious.

Any other rule would necessarily impose upon the carrier duties not embraced by a reasonable interpretation of the contract. The payment of the fare entitles the passenger to have his ordinary baggage carried and checked to his destination. If he, by law, can stop at intermediate points at his pleasure, he may demand his baggage at each place, or if it goes on he will not be at his journey's end to receive it. Thus additional attention will be required upon the part of the company, an increased risk of accident created, and delays occasioned not within the fair scope of the contract. (*Railroad Co. v. Bartram*, 11 Ohio St. Rep. 457; 2 Rorer on Railroads, page 971, *et seq.*)

But, upon the other hand, the company owes duties to the passenger. By the contract, it undertakes to make the transit covered by the ticket within a reasonable time; and it is only when it is doing so in a reasonable manner that the passenger has no right to leave the train, and take passage upon another under the original contract. To hold that he cannot under any circumstances whatever make a re-election of trains would give to the carrier an unfair advantage in the performance of the contract, and would be an unjust discrimination against the public. Reason dictates that for *good cause* a passenger may leave a train, and have his baggage delivered and embark upon another. The peculiar circumstances of this case say so. Here is a sick passenger upon a train, which about dark is stopped upon the road by a wreck ahead of it, and upon its own road. It matters not whether the wreck resulted from the company's neglect or not. It exists, and impedes the further passage of the train, and prevents the company from complying with the contract as it has undertaken to do within a reasonable time and in a reasonable manner. The passenger is informed by the train officials that the delay will last several hours; perhaps all night; that they cannot tell when it will go on, and they fix no time when he must be present and ready to proceed. Is he in such a case required to remain upon the train all night or for an unknown time? We think not. Suppose the particular train upon which he has embarked was by some accident disabled from proceeding at all; would he not be entitled to take a later one, and proceed to his destination without the payment of additional fare? The delay in question could not be considered an ordinary one, and that hence the passenger must submit to it. The appellee was not bound to wait all night in the train, or from seven o'clock in the evening until four o'clock the next morning for the train to proceed. The company itself

having first failed in the performance of the contract within a reasonable time, reason, a fair interpretation of the contract, as well as public policy, require a different rule in such cases from the general one. It is perhaps impossible to lay down one which will apply to all cases, as each one must necessarily depend upon its own peculiar circumstances; but if from accident or misfortune or other cause, and without the passenger's fault, his transit be interrupted, and it be more than an ordinary delay, then he may resume his journey afterward upon a different train, and without the repayment of fare.

In the case of *Dietrich v. Penn. Railroad Co.*, 71 Penn. St. Rep. 432, the circumstances of the case did not authorize the court to so hold in behalf of the plaintiff; but the court, in delivering the opinion, said:

"In adopting the language of the learned Chief Justice of New Jersey, we should not omit to guard our meaning by saying there may be exceptions where, from misfortune or accident, without his fault, the transit of a passenger is interrupted, and where he may resume his journey afterwards."

For the additional reason that the ruling of the lower court did not conform to this view of the law, the judgment below is reversed, and cause remanded for further proceedings in conformity to this opinion.

GREAT NORTHERN RAILWAY CO. *v.* PALMER.

QUEEN'S BENCH DIVISION, 1895.

[1895, 1 Q. B. 862.]

ON August 4, 1894, the defendant took at Peterborough a return ticket from Peterborough to Woodhall Spa; the ticket was a cheap excursion ticket available for the outward journey on the day of issue only, and for the return journey up to August 7; the price was 4s. 6d. Upon the face of the ticket in the bottom corner were the words "See back" in small print, and on the back, also in small print, were the words, "if used for any other train or station than that named this ticket will be forfeited and the full fare charged." The defendant travelled by the excursion train to Woodhall Spa and went further on to a station called Horncastle, the fare to which place from Woodhall Spa is 5½d., and tendered at Horncastle the outward half of her excursion ticket together with the sum of 5½d., which was refused by the ticket collector. On August 7 she returned, paying 5½d. for a ticket from Horncastle to Woodhall Spa, and using the return half of her excursion ticket for the distance between Woodhall Spa and Peterborough. The ordinary single fare from Peterborough to Woodhall Spa is 3s. 11½d., and the return fare 7s. 11d.; the ordinary single fare from Peterborough to Horncastle is 4s. 5½d., and the return fare 8s. 11d. The plaintiffs claimed to be entitled to treat the ticket issued to the defendant as forfeited, and brought this action to recover the full return

fare from Peterborough to Horncastle and back, or in the alternative the difference between that sum and the amount actually paid by the defendant. The defendant paid into court $5\frac{1}{2}d$. in respect of the journey from Woodhall Spa to Horncastle, which sum had been tendered by her on her arrival at Horncastle, but refused. It was admitted that the defendant, who did not appear at the trial in the county court, had acted bona fide under the belief that she was entitled to use the ticket as she had done. The learned county court judge nonsuited the plaintiffs, but gave leave to appeal. Upon the appeal the plaintiffs only asked for judgment for the difference between the fares, and did not ask for the full fare payable on the ticket being forfeited.

WILLS, J.¹ This case is, in my opinion, a very clear one upon the only point open to us, for I do not think that the question whether there was evidence to fix the defendant with notice of the condition arises for our consideration. Assuming that the indorsement upon the ticket formed part of the conditions of the contract between the parties, I think that the plaintiffs were entitled to treat the ticket and the money paid for it as forfeited; and although they are not taking that course, but are treating the money paid as having been paid in reduction of the fare between Peterborough and Horncastle, we must regard the case from the point of view of their right to claim the forfeiture. No one can doubt that the practice of railway companies in making special contracts for carrying passengers on special terms at low fares is a great boon to the community; and if a railway company running an excursion train at cheap fares to a place within a few miles of London were bound to treat that journey as part of a journey from the starting-point to London, and were therefore only able to charge a person travelling on beyond the terminus of the excursion to London the extra fare between those places, this most useful practice would be put a stop to. When a passenger takes a special ticket to a named place and back at a cheap fare, the carriage of the passenger to that place and back is the only service which the railway company contracts to perform: it cannot, if the passenger goes on to another station, be treated as part of the service rendered by the company in taking him to a place to which they did not contract to carry him. In my judgment the practice is a right and reasonable one, and one which, on grounds of public policy, ought to be favored. I have no doubt that in the present case the condition formed part of the contract, and I am quite unable to see upon what ground a condition not to use a ticket for "any other station" than that named on it can be confined to intermediate stations; it is equally applicable to stations beyond the named terminus of the journey. I think that when the defendant went on beyond Woodhall Spa she was making a journey from Peterborough to Horncastle, and was not making a second and separate journey: whether she intended to do so or not at the time of taking her ticket

¹ Arguments of counsel and the concurring opinion of WRIGHT, J., are omitted.
—ED.

is immaterial; the facts show that she elected to make a different journey to that for which she bargained. I think, therefore, that her ticket was forfeited, and that the claim of the plaintiffs is good. The point as to bringing home notice of the condition to the defendant is, as I have said, not open to us; if it were, I am inclined to think that it would be a question whether the plaintiffs did do what was reasonably sufficient.

BROOKE v. GRAND TRUNK RAILWAY CO.

SUPREME COURT OF MICHIGAN, 1867.

[15 Mich. 332.]

CAMPBELL, J. Plaintiff sued defendants for ejecting him from one of their cars. He purchased in Buffalo, in June, 1866, tickets from Buffalo to Detroit, consisting of two tickets on one piece of paper, one from Buffalo to Stratford by the Buffalo and Lake Huron Railway, and one from Stratford to Detroit by the Grand Trunk Railway. Upon the first ticket he rode to Brantford, in Canada, and remained there about two months. Then he went from Brantford to Stratford on the same ticket. Thence he went to Port Huron, in Michigan, on the second ticket, which was punched by the conductor and handed back. Between Port Huron and Detroit the conductor of the train on which he was riding between those places, ejected him from the cars on his refusal to pay his fare, and would not receive the ticket as valid.

Defendants, among other things, introduced testimony to prove that fare for through tickets from Buffalo to Detroit was, at the time these tickets were sold, cheaper than was charged for some intermediate points to Detroit, and that the defendants had an arrangement with the Buffalo and Lake Huron Railway, whereby they were enabled to carry passengers and freight through from Buffalo to Detroit. Also, that, by the regulations of the company, persons having a through ticket from one point to another upon the line, could not stop at intermediate stations.

The court below held that the plaintiff was only entitled to a continuous passage, and, after leaving Buffalo, was bound to proceed to Detroit on the same train, or lose the right, after once stopping, to proceed further on his ticket.

The court also instructed the jury that, if the plaintiff had a right to treat the second ticket as valid from Stratford to Detroit, yet he had abandoned the train on which he started at Port Huron, and the ticket was unavailable upon any other train. This latter charge appears by the bill of exceptions to have been based upon an assumption of facts which it belonged to the jury to determine, inasmuch as the evidence conflicted. Accordingly, it becomes necessary to consider the former ruling, which treated the whole journey from Buffalo to Detroit as

single, and which, therefore, if correct, obviated the error caused by taking the facts on the last charge from the jury.

The circumstances of the present case render it unnecessary to consider whether a simple contract, made to transport a passenger in a single journey beyond the line of the road with which he contracts for passage, renders the contracting company liable as a carrier for what occurs upon another railway. In the case before us, the tickets purport to provide expressly for passage over the lines of two separate companies, and neither ticket extends beyond one line. Each is the voucher for a journey between two specified points. Neither refers to the other in terms, and neither contains any words of restriction.

It was claimed that these tickets are not contracts, and can not, therefore, be of any force in determining the rights of the plaintiff, but that he must be considered as having purchased what was equivalent to a single through passage. Whether a through ticket over the roads of two separate companies would entail all the same consequences as if they were owned by one, need not now be considered. But we can not regard these tickets in any such light. Although they are very informal documents, yet they are easily recognizable as vouchers for separate journeys over distinct roads, one issued by a company on its own behalf, and one issued by the same company in behalf of another. The purchaser must necessarily infer from their face that one of them was issued under some claim of agency; and he had a right to treat them according to their purport. They are the usual evidences of a contract of passage; and whatever may be their imperfections as substitutes for more formal agreements, they must be treated as valid for all which they purport to express. They are no more dependent, merely because printed together, than they would be if each were precisely like the other.

We think that it was not incumbent upon the plaintiff to use these tickets for one continuous journey but that, having used one of them to reach the terminus denoted by it, he was at liberty to begin his second journey when he pleased. The general rule, requiring each separate journey to be completed without needless interruptions, was conceded on the argument, and there are no facts calling upon us to decide whether there are any circumstances of convenience or necessity which can vary it. The plaintiff had a right to use his ticket from Stratford to Detroit, notwithstanding the time which had elapsed after its issue. He had a right to have the jury determine whether he lay over between Stratford and Detroit. The rulings disposed of his entire cause of action, and took away the facts from the jury, touching the continuity of the last journey.

The court erred in holding the two tickets to be valid only for a single continuous passage from Buffalo to Detroit, and also in directing the jury that a second journey had been interrupted.

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

HUDSON v. KANSAS PACIFIC RAILWAY CO.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF COLORADO, 1882.

[3 *McCrury*, 249.]

HALLETT, Dist. J. Plaintiff alleged that he purchased at St. Louis and at Kansas City, Missouri, in the year 1879, of defendant's agents, certain passenger tickets over the lines of the Denver & Rio Grande Railway, in this state, paying therefor the prices named in the complaint, and that the tickets were, and are, worthless, as the Rio Grande Company refuse to recognize them. At the trial it appeared that the tickets were issued by eastern companies having lines extending to Kansas City, not to the plaintiff, as alleged, but to travellers in the regular course of business. When issued, they provided for passage over the line of the company by which they were issued to Kansas City, and from that place to Denver, over defendant's line, and from Denver to destination, over the lines of the Rio Grande Company. Coupons were attached applicable to the several parts of the route, and as the Rio Grande Company was to complete the contract, its coupon was the last of the series, and connected with the general provisions constituting the contract. All of them were in substance like those issued by the Missouri Pacific Railway Company, in the following form :

<p style="text-align: center;">MISSOURI PACIFIC RAILWAY.</p> <p>This Ticket entitles the holder to one First-Class Passage</p> <p style="text-align: center;">TO TRINIDAD, COLORADO.</p> <p>This Ticket is void unless officially stamped and dated. In selling this Ticket for Passage over other roads this company acts only as Agent, and assumes no responsibility beyond its own line. This Company assumes no risk on baggage, except for wearing apparel, and limits its responsibility to \$100 in value. All baggage exceeding that value will be at the risk of the owner unless taken by special contract. The checks belonging to this Ticket will be void if detached.</p> <p style="text-align: right;">F. E. FOWLER, Acting Gen'l Passenger Agent.</p> <p>FORM 307.</p>	<p style="text-align: right;">FORM 307.</p> <p style="text-align: center;">Issued by MISSOURI PACIFIC RAILWAY COMPANY. Denver & Rio Grande R'y. One First-Class Passage, Denver to Trinidad. This Check is not good if detached.</p> <p style="text-align: right;">M P & P-D & R G. Trinidad, Col.</p> <p style="text-align: right;">23</p>
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It will be observed that there are no conditions as to the time of performing the journey, or as to the right of the purchaser to transfer the ticket to another. It entitles the holder "to one first-class passage" from the place of departure, which, in this instance, was St. Louis, Missouri, to Trinidad, Colorado.

At its office in Denver, for a month or more, the defendant redeemed tickets similar to these in all respects, paying therefor local rates from Denver to the points named in the tickets. It was not then contended

that the right was limited to the original purchaser, but payment was made to the holder, and many of them were presented by the plaintiff himself, who received the money for them. The tickets in suit were bought by plaintiff, who calls himself a "ticket broker," in the expectation that defendant would redeem them as had been done with others of the same class. As to these tickets, defendant's agent at first requested plaintiff to hold them a few days until the money should be received for redeeming them, and, after four days, defendant absolutely refused to redeem them. Meantime plaintiff had bought others of the same class, amounting in all to the sum in controversy, and after defendant refused them he bought no more.

As to what may be a fair deduction from this proceeding, concerning defendant's liability, there is not much room for discussion. That defendant should accept the coupon for travel over its own line implies only that it was sold by its authority. But if that was the limit of authority in the company selling the ticket, why should defendant assume responsibility in respect to the remainder of the journey over the Rio Grande line? As to tickets of this class, defendant not only performed the part assigned to it in the original contract by carrying the passenger from Kansas City to Denver, but also protected the remainder of the ticket by furnishing a local ticket to destination, or paying the money which would procure it. A fair inference from such conduct may be that the ticket was originally sold by its authority. And if sold by defendant's authority, and the Rio Grande Company refused to carry the passenger according to its terms, the defendant was clearly liable to some one for the value of the ticket. It must often happen in the effort to draw travel over its lines which would otherwise go to a rival, that a railroad company will assume the burden of carrying a passenger beyond its own terminus, and in such case there would seem to be nothing in reason or authority to exempt it from liability on its contract.

It is conceded that a railroad company may contract to carry a passenger any distance, provided its own line be a part of the journey. And whether the part owned by the contracting company be the first or the last, or from the middle, must be wholly immaterial. The principle is, that, in promoting its own business, a railroad company may make any contract which it may have capacity to perform in some part, although not the whole, and the exact part, whether great or small, cannot be material.

The objection that a contract for transportation over a railroad, is not assignable by a passenger, if correct in principle, does not meet the case. The evidence shows that the Rio Grande Company did not accept the tickets, and it must have been known to defendant when they were sold that they would not be honored. The fact that other tickets bought of the Rio Grande Company were given in lieu of them, or that money was paid for them at the option of the holder, admits of no other construction. The truth appears to be that the tickets were not sold to

be used on the Rio Grande road according to their terms, and could not be so used. How, then, shall we say that the purchaser was bound to ride in person, when he was not allowed to ride either in person or by another, or in any way. If he has no remedy in damages, it would seem that he is without remedy.

It may be conceded also that a ticket is a receipt for passage money, and not full evidence of the contract to carry, as declared in *Quimby's Case*, 17 N. Y. 306. But it is, nevertheless, in the hands of the passenger, evidence of his right to be on the train, without which he cannot travel. By delivering it to another, he may signify his purpose to assign his contract with defendant, and that should be enough.

We have seen that although the tickets were for passage over the Rio Grande road they were not available for that purpose, and the right of the holder to demand of defendant a ticket or money, whatever it was, could be maintained. That it was assignable under our statute, so as to give a right of action to the assignee, would seem to be clear, and the delivery of the ticket, although it should be called a receipt or token, should be evidence of such assignment. Can it be questioned that in delivering the ticket to plaintiff the holder intended to part with his right? If he did so intend, the right of action is now in the plaintiff, although the contract as originally made may have contained something more than is expressed in the ticket.

It is also said that the facts appearing in evidence are not set out in the complaint, and the proof varies from the allegation. The plaintiff charges that *he* purchased the tickets of defendant's agents, and the fact appears to be that they were bought by others, of whom plaintiff bought them. He has said nothing in the complaint of the redemption of the tickets by defendant, but relied on the refusal of the Rio Grande Company to honor them. Whatever weight this objection would have, if made at the trial, it is believed that it comes too late after verdict. The matter in issue between the parties was the present value of the tickets, as defendant must have understood from the complaint, and no formal objection can now be entertained.

The motion for new trial will be denied.

PETERSON v. CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY CO.

SUPREME COURT OF IOWA, 1890.

[80 Ia. 92.]

ROTHROCK, C. J. I. In the month of October, 1886, W. D. Peterson, the husband of the plaintiff, made a contract at Davenport, in this State, for transportation for himself and family from Davenport to Los Angeles, California. He purchased three through tickets, for which he paid the agent of the Rock Island Company the sum of two hundred and fifty dollars. He had certain travelling trunks, which

were checked by the Rock Island Company to Kansas city. The tickets were what is known as "coupon tickets." The first coupon was good for transportation over the Rock Island road to Kansas City; the next coupon was for passage over the Atchison, Topeka and Santa Fe railroad from Kansas City to its junction with the Atlantic and Pacific railway, and on the last-named road to its junction with the California Southern railroad; and the last coupon was for passage over the last-named road to Los Angeles. The following is a copy of one of the tickets purchased by said Peterson at Davenport, with the last coupon attached thereto:¹

All the coupons were attached to the ticket, and they were in the same words and figures, with the exception of the name of the road over which they were good for travel, and the names of the stations on the line of road as appears on the margin. Taken altogether, the tickets were good for the entire route by one continuous passage from Davenport to Los Angeles, over the four connecting railways above named. When the said Peterson and his family arrived at Kansas City, he presented his checks to a baggageman in the railroad depot at that place, and had his trunk rechecked to Los Angeles. The baggage went through to its destination by the same train which carried Peterson and his family. Upon his arrival at Los Angeles, he delivered his checks to some one representing a transfer company, and the trunks were delivered at the hotel where the family stopped in about an hour after the checks were delivered to the agent of the transfer company. When delivered to said Peterson, and opened, it was found that some of the trunks had been unlocked and opened, and wearing apparel and ornaments and other property had been taken therefrom of the value of about four hundred and fifty dollars, and the trunks had been again locked and fastened, so that when delivered to the owners at Los Angeles they had the appearance of not having been opened. There is no question made upon the fact that the trunks were pillaged at some point between Davenport and Los Angeles, as the said passengers had no access to the trunks on the journey, and did not see them except at Kansas City. The plaintiff's husband duly assigned all claim he had to recompense for the loss to the plaintiff, and the action to recover for the stolen goods was brought against all four of the connecting roads by which the journey was made.

The first count of the petition is based upon an alleged conspiracy of the four defendant companies, by which they confederated together and organized and perfected a plan by which said baggage should be transported over said lines of travel in such a way that defendants could steal the contents, and relock the trunks, so that it would be impossible for the owners of the same to discover, without the assistance of defendants, upon the road of which of said defendants said stealing was actually done. It is scarcely necessary to say that, if there was evidence to sustain this count of the petition, the plaintiff would be

¹ The copy of the ticket is omitted.—Ed.

entitled to recover of any one or all of the defendants. But there is no such evidence. This count of the petition demands no further consideration.

II. In an amendment to the petition the plaintiff set up a second and further cause of action, in which it is, in substance, alleged that, at the time the tickets were purchased by Peterson and the journey was made, the four railroad companies owned and operated by the defendants formed a complete connecting line of railway from Davenport to Los Angeles, and at said time said four defendants had formed and entered into an agreement and combination for the purpose of transporting passengers and their baggage from Davenport to Los Angeles, by using said four lines of railway as a continuous line between said places, and making one fare or charge for such transportation for the entire distance; "that said business of transporting said baggage was done by defendants in such a manner that it was impossible for plaintiff or her husband to know or discover at what particular place on said route said property was taken from said trunks, and she is, therefore, unable to state." There was no evidence to sustain this count of the petition as against the Chicago, Rock Island and Pacific Railroad Company. On the contrary, it is expressly provided, on the face of the ticket, that the said company assumed "no responsibility beyond its own line." It did not check the baggage beyond its own line, and the evidence shows that the trunks were not opened while they were in the possession of that company. When the baggage was delivered at Kansas City, the checks taken up and the trunks rechecked, the contract, so far as the Rock Island Company was concerned, was fully performed. This court is committed to the doctrine that the receiving or initial carrier may, by a stipulation in the bill of lading or contract of carriage, limit its liability to injuries to the consignment which occur on its own line. *Mulligan v. Railway Co.*, 36 Iowa, 181. We do not understand counsel for appellant to claim that the court erred in directing a verdict for the Rock Island Company, and it has made no appearance in this court, and has not filed either brief or argument.

The important question to be determined in the case is whether the other three defendants are jointly, or, rather, jointly and severally, liable for the pillage of plaintiff's baggage. That some one of them is liable there can be no serious question. It is true the larceny may have been committed by the employes of the transfer company at Los Angeles. But, in view of the brief time between the delivery of the checks and the arrival of the baggage at the hotel, this is not at all probable. To determine this question, it will be necessary to analyze the contract, and determine its legal effect upon the rights of the parties. It will be observed that the ticket does not provide that the Atchison, Topeka and Santa Fe, the Atlantic and Pacific, and the California Southern Railroad companies assumed no responsibility beyond their own lines. Their obligation is, therefore, to be determined by

the ticket with the coupons attached, and by the other facts developed in the evidence tending to show what the real contract was; and here it is proper to say that a railroad passenger ticket does not ordinarily import a complete contract. It is in some sense like a check for baggage. It is issued by the carrier as the evidence of the right of the passenger to transportation between the points named on the face of the ticket. It is surely not as complete a contract in form as a bill of lading for the transportation of goods, and a bill of lading is everywhere recognized as a receipt as well as a contract. In the case of *Steamboat Co. v. Brown*, 54 Pa. St. 77, speaking of a bill of lading, it is said: "On its face, it is but a memorandum, and not in form a contract *inter partes*. It is doubtless an instrument fitted for the occasions in which it is usually employed; and while what it clearly expresses may not be contradicted by oral testimony, unless under the qualification of fraud or mistake, yet there is no rule which excludes testimony to explain it, and to show what the real contract was, of which it is but a note or memorandum at best." And see *Quimby v. Vanderbilt*, 17 N. Y. 306. This court has determined that, where a contract is partly in writing and partly by verbal agreement, parol evidence may be introduced to show the portion of the contract not reduced to writing. *Singer Sewing Machine Co. v. Holcomb*, 40 Iowa, 43; *Keen v. Beckman*, 66 Iowa, 672.

Applying this rule to the evidence in this case, it appears that the Rock Island Railroad Company or its ticket agent was authorized to sell through tickets over the three other roads, and to collect and receive the full fare for the whole distance from Kansas City to Los Angeles. How this was divided among the said companies does not appear. So far as it appeared to Peterson, the purchaser of the tickets, it was a joint transaction. The ticket recognizes the right of the passenger to have baggage transported over the respective lines, and an attempt was made to limit the liability to one hundred dollars, but no reference is made to any several liability of any company forming the line, except the Rock Island Company. The Rock Island Company, as the agent of the other lines, had no authority to check baggage over them. This is apparent from the fact that the trunks were passed over the Rock Island road without question as to their weight, but, when they were rechecked by the Atchison, Topeka and Santa Fe Company at Kansas City, the sum of twenty-seven dollars on extra baggage was exacted by the company, and paid by Peterson, and in consideration thereof the baggage was checked through to Los Angeles. This was, in effect, paying to all three of the companies for carrying extra baggage from Kansas City to the end of the journey. It appears that the trunks and Peterson and his family were all carried through to Los Angeles on the same train. It does not appear whether there was any change of passenger or baggage cars in the train. The checks delivered to Peterson at Kansas City imported an obligation on the part of the three companies to carry the baggage through to its desti-

nation. A check for baggage has the same elements of a contract as an ordinary railway passenger ticket. It is, to say the least, some evidence of the contract between the carrier and the traveller for the transportation of his baggage. *Anderson v. Railway Co.*, 65 Iowa, 131. An examination of the coupon attached to the ticket above set out will show that, at the foot of the coupon, the initials of all of the defendants appear. It is not claimed that these initials are not intended to represent the defendants. There is no evidence tending to show for what purpose these initials were placed there, but it is conceded they were on all the coupons. It is contended by counsel for appellees that these initials were placed upon the coupons to indicate the route pursued by the traveller. Counsel for appellant claim that they are signatures to a contract. In the absence of any evidence, and in construing the contract so far as it is written, and in connection with the facts above recited, we think the defendants ought not to complain if it be held that they imported a joint obligation upon the part of the defendants, except the Rock Island Company, which, by the express stipulation in the body of the ticket, is not bound for any failure beyond its own line. The appearance of these initial letters on all the coupons was, to say the least, an important fact, to be considered in determining whether, as to the last three roads in the line, there were three separate contracts or one joint contract; and we can see no valid reason why it may not be held that the contract, so far as the last three roads are concerned, was completed by what occurred at Kansas City and afterwards. It is true the Atchison, Topeka and Santa Fe Company was an intermediate carrier. But such a carrier may, by its contract, make itself liable for the safe transportation of the baggage through the entire route. *Beard v. Railway Co.*, 79 Iowa, 518.

It is important to understand just what question was determined by the district court. The direction to the jury to return a verdict for the defendants was, in effect, a holding that there was not sufficient evidence to submit to the jury to justify a verdict that the defendants were jointly liable. In other words, that the ticket, with the coupons attached, together with parole evidence, showed that four separate contracts were made, which made four causes of action, or one action against each company for spoliation of the baggage on its road only, and that there was, therefore, a misjoinder of causes of action. If this was correct, there could be no recovery against either company, because there was no evidence at what point of the line the trunks were unlocked and the property removed. The counsel for the plaintiff cited a large number of cases, which it is claimed hold that, under like facts, the several lines are held to be jointly liable, and other cases where the last carrier in the continuous line is held liable. The following are some of the authorities relied upon: *Laughlin v. Railway Co.*, 28 Wis. 204; *Brintnall v. Railway Co.*, 32 Vt. 665; *Hart v. Railway Co.*, 8 N. Y. 37; *Fairchild v. Slocum*, 19 Wend. 329; *Wolff v. Railway Co.*, 68 Ga. 653; *Railway Co. v. McIntosh*, 73 Ga. 532; *Barter*

v. Wheeler, 49 N. H. 9; and *Harp v. The Grand Era*, 1 Woods, 184.

In the last above case the action was against an intermediate carrier, and in all the others the action was either against the receiving carrier or the last one in the line. In one of the cases — that of *Laughlin v. Railway Co.* — the action was against the last carrier. There was no evidence at what point the goods were stolen, and the court held the defendant liable upon the presumption that the goods were stolen in the possession of the last carrier. In *Brintnall v. Railway Co.*, the plaintiff was permitted to recover of the receiving carrier, because, when the goods were shown to have been in its custody, it was incumbent on it to show that it had delivered the goods to the next carrier in the line. It may be said of all the cited cases that they rest mainly upon what is deemed presumptions. These presumptions are grounded upon the necessities of the cases, rather than upon any clear and well-defined legal grounds. Indeed, many of them are really grounded upon the thought that, where it is impossible for the owner to show upon which part of the whole line of travel the property was lost or stolen, it is incumbent on the defendant to show itself clear of the loss. In one of the cited cases (*Smith v. Railway Co.*, 43 Barb. 225), it is said: "Unless this rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point, or in the hands of which company, the injury happened." Others of the cited cases hold the defendants liable upon grounds which are really based upon the thought that all of the connecting lines are jointly liable. This is true of the case of *Wolff v. Railway Co.*, 68 Ga. 653; and in *Railway Co. v. Fort*, 9 Am. & Eng. R. R. Cas. 392, and *Railway Co. v. Ferguson*, 9 Am. & Eng. R. R. Cas. 395, the Supreme Court of Texas holds that, when a person purchases a through ticket over several railroads, and procures a corresponding check for his baggage, and the baggage is lost, each carrier is the agent of all the others, and is liable to any damage to the baggage on whatever part of the line the damage was done. The case of *Harp v. The Grand Era*, *supra*, is to the same effect.

On the other hand, we are cited by counsel for appellee to a large number of cases which determine that, where several connecting companies form a through line, each operating its own road, and through tickets with coupons attached are sold over the entire route for a single fare, there is no joint liability by reason thereof, and each carrier will only be liable for defaults occurring on its own road, except that in some states the receiving carrier is presumed to contract for carriage over the entire route. Among the cases cited are the following: *Ellsworth v. Tartt*, 26 Ala. 733; *Hood v. Railway Co.*, 22 Conn. 12; *Knight v. Railway Co.*, 56 Me. 240; *Croft v. Railway Co.*, 1 McArthur, 492; *Kessler v. Railway Co.*, 61 N. Y. 538; *Railway Co. v. Roach*, 35 Kan. 740; 12 Pac. Rep. 93. The length of this opinion forbids that we should review these cases.

After a very full and careful examination of the subject, Mr. Hutchinson, in his work on carriers (page 131), says: "From these cases it may be deduced: *First*, that where carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it, after deducting any of the expenses of the business, they become jointly liable as partners to third persons; but that, where the agreement is that each shall bear the expenses of his own route, and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability." We think this is a fair statement of the rule of joint liability which is supported by the great weight of authority.

It only remains to be determined whether the evidence in this case authorized the jury to find a joint liability. We think it did. It is true there is no express proof that these defendants were partners. But it is to be remembered that the plaintiff made the best proof of which her case was capable. The facts as to the relation which these companies sustained to each other, and the impossibility of proving where or on which road the trunks were pillaged; the receipt of the whole of the fare by their joint agent, the Rock Island Railway Company; the collection of the charge for extra baggage at Kansas City; and the fact that the trunks were checked through and carried to the end of the journey on the same train with Peterson and his family; and the initials of all of the companies to each coupon, authorized a finding that the undertaking was a joint transaction, at least so far as the rights of the passengers to have their baggage safely carried were involved. In our opinion, the cause ought to have been submitted to the jury.

Reversed.

TALCOTT v. WABASH RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1899.

[159 N. Y. 461.]

VANN, J.¹ . . . The company had the power to contract for through transportation, for it has long been settled that an owner of one of several lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the whole route and that such contract may be established by the circumstances, notwithstanding the passenger received tickets for the different lines signed by their separate agents. (*Quimby v. Vanderbilt*, 17 N. Y. 306; *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 N. Y. 37; *Williams v. Vanderbilt*, 28 N. Y. 217, 221; *Buffett v. Troy & Boston R. R. Co.*, 40 N. Y. 168, 172; *Condict v. Grand Trunk Ry. Co.*, 54 N. Y. 500, 502.) While the company had

¹ Part of this opinion only is given. GRAY, J. delivered a dissenting opinion. — ED.

the power to contract for through transportation, the question remains whether it did so contract. The facts bearing upon this question are few and simple. Mr. Cullom asked the company's ticket agent for a ticket to New York, paid him the sum demanded and nothing farther was said or done except the delivery of the ticket. The company was not a common carrier of passengers between Chicago and New York and did not hold itself out as such. Its line did not extend east of Detroit. Mr. Cullom testified that he knew the Wabash railroad did not extend to New York and was not a common carrier to that point, but that its eastern terminus was at Detroit; that he knew the ticket he intended to purchase was a ticket of the West Shore Company for the portion of the route between Suspension Bridge and New York city, and that for the portion of the journey from Detroit to Suspension Bridge he would have to use some line between the terminus of the Wabash and the beginning of the West Shore; that the ticket he was to purchase was a coupon ticket with one coupon for each railroad over which he was to travel. He further testified: "I knew that besides the coupons for the different portions of the journey, there was a printed contract at the head of the ticket, but did not read it until after the accident. I saw it was there and did not pay any attention to what it read. I have been accustomed during the years in which I have journeyed about the country to make long continuous journeys over connecting railroads, and when I left New York for Peoria my journey took me over connecting roads and I purchased one coupon ticket as I was accustomed to do when I make journeys of long distances with the coupon of each road for the portion of the line over that road. I know it is the custom in the course of business of railroads generally in the country to sell tickets over their own and connecting lines with the coupon of each road for the portion of the line over that particular road, and the ticket I bought was of the same general character and had coupons."

The ticket delivered to Mr. Cullom was an old form, at one time used by the Wabash, St. Louis & Pacific Railway Company, still such tickets were used occasionally by the Wabash Western, which succeeded to the ownership of the line from Chicago to Detroit. While we regard the ticket as a voucher and not a contract with the Wabash Western, because its name does not appear therein, still, it was a coupon ticket with the names of the connecting lines printed upon the face of the coupons. Mr. Cullom knew what a coupon ticket meant, and he intended to purchase a ticket that would take him over the West Shore and another connecting line. This warranted the inference of notice to him of what was stated at the head of the ticket, to wit, that the company "selling this ticket" acted "as agent," and that it did not intend to become "responsible beyond its own line." This is true, even if the name of the company was not correctly given. While not controlling, it was a circumstance of importance to be considered in connection with the other important fact that Cullom paid through fare

to New York, and received a through ticket to that place. Upon all the evidence we think it became a question of fact whether the contract was for through transportation or not, and that the referee was not bound, as matter of law, to find in accordance with the plaintiff's theory. (*Milnor v. N. Y. & N. H. R. R. Co.*, 53 N. Y. 363; *Kessler v. N. Y. C. & H. R. R. R. Co.*, 61 N. Y. 538; *Auerbach v. N. Y. C. & H. R. R. R. Co.*, 89 N. Y. 281; *Isaacson v. N. Y. C. & H. R. R. R. Co.*, 94 N. Y. 283; *Root v. Great Western R. R. Co.*, 45 N. Y. 524; *Thomas on Negligence*, 194; *Hutchinson on Carriers* [2d ed.], 822.)

The plaintiff having failed to establish such a contract as would enable him to recover upon the second cause of action, it follows that the complaint was properly dismissed as to that count of the complaint.

The judgment below should, therefore, be reversed and a new trial granted as to the first cause of action set forth in the complaint, and in all other respects affirmed, without costs in this court to either party.

ERIE RAILROAD COMPANY *v.* SHUART.

SUPREME COURT OF THE UNITED STATES, 1919.

[250 U. S.]

McREYNOLDS, J. Respondents delivered to the Toledo, St. Louis & Western Railroad, at East St. Louis, Ill., a carload of horses for transportation, under a limited liability live-stock contract or bill of lading via petitioner's road, to themselves at Suffern, N. Y., their home. Among other things the contract provided:

"That the said shipper is at his own sole risk and expense to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same. . . . That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the general auditor of the said carrier at his office in the city of Chicago, Ill., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier, on whose line the loss or injury occurs."

Immediately after the car arrived at Suffern, petitioner placed it on a switch track opposite a cattle chute and left it in charge of respondents for unloading. By letting down a bridge they at once connected the chute and car and were about to lead out four horses, when an engine pushed other cars against it and injured the animals therein. No written claim was made for the loss or damage as provided by the bill of lading; and when sued the carrier defended upon that ground. Respondents maintain that transportation had ended when the accident occurred and consequently no written claim was necessary. The courts below accepted this view.

Under our former opinions, the clause requiring presentation of a written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for. *Chesapeake & Ohio Ry. Co. v. McLaughlin*, 242 U. S. 142, 37 Sup. Ct. 40, 61 L. Ed. 207; *St. Louis, Iron Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917; *Baltimore & Ohio R. R. Co. v. J. G. Leach*, 249 U. S. —, 39 Sup. Ct. 254, 63 L. Ed. — (decided March 10, 1919); *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach*, 239 U. S. 588, 593, 594, 36 Sup. Ct. 177, 60 L. Ed. 453; *Southern Ry. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettle-*

bach we pointed out that the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584) enlarged the definition of "transportation" so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage and hauling of property transported," and we said from this and other provisions of the act "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the act respecting reasonable rates and the like."

In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated and controlled by the railroad. If its employes had been doing the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed, was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See *Hutchinson on Carriers*, §§ 711, 714, 715.

Petitioner's request for an instructed verdict in its behalf should have been granted. The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

CLARKE, J., dissenting. I greatly regret that I cannot concur in the opinion and judgment of the court in this case, but I cannot consent to share in what seems to me a very strained construction of a definition in the Hepburn Act (34 Stat. 584, c. 3591, § 1 [Comp. St. § 8563]) which will result in keeping alive a bill of lading, with the effect of excusing the carrier from liability for negligently damaging the live stock of a consignee, after it had been delivered, on the ground that a claim in writing for the damage, duly verified, had not been presented within five days. . . . What constitutes delivery of goods or of live stock by a carrier is usually a mixed question of law and fact, but where, as here, the facts are not disputed, it is a question of law.

What more was there for the carrier to do, — what more could it have done — to make more complete the delivery necessary to fulfill its obligation as a carrier? The journey was ended, the freight charges were paid, and the car was placed on a side track in an appropriate place

and position for unloading, which was approved by the consignee. It had been accepted by two members of the partnership, consignee, and had passed into their exclusive custody a full half hour before the accident. No assistance was asked for or needed after the conductor delivered the car and went away and thereafter the carrier owed to the consignee only the duty which it owed to any property lawfully upon or near to its tracks — not to negligently or willfully injure it, and it was for violation of that duty, not for failure to discharge duties imposed by the bill of lading, that this suit was instituted. The case is one of side-track delivery, the equivalent of the familiar delivery of a car to an "industrial track" or "team unloading track" of a railroad, with possession taken by the consignee before the damage was done.

To the weighty authority of the New York courts which decided in this case that the delivery was complete before the damage was done, may be added, a few from many, the decisions of the Supreme Courts — of Michigan, in a strikingly similar case, but with not so complete a delivery, in *Brown v. Pontiac, etc., R. R. Co.*, 133 Mich. 371, 94 N. W. 1050; of Illinois, in *Gratiot Street Warehouse Co. v. St. Louis, etc., R. R. Co.*, 221 Ill. 418, 77 N. E. 675; of North Carolina, in *Reid v. Southern Railway Co.*, 149 N. C. 423, 63 S. E. 112; of Georgia, in *Kenny Co. v. Atlanta, etc., R. R. Co.*, 122 Ga. 365, 50 S. E. 132; and see *Hedges v. Railroad Co.*, 49 N. Y. 223.

The definition of "transportation" in the Hepburn Act (34 Stat. 584), relied upon in the court's opinion, seems to me quite irrelevant. That provision was incorporated into the act to prevent unjust discrimination by carriers in terminal delivery charges, as the context and the history of the act abundantly show. It defined "transportation," but did not define what should constitute delivery to a consignee; that was left untouched and is governed by the prior decisions of courts and by those which have been developed since.

Equally beside the question involved seems to me the decision in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach*, 239 U. S. 588, 593, 594, 36 Sup. Ct. 177, 60 L. Ed. 453, cited in the opinion of the court. The question there under consideration was, whether when goods carried to destination were lost, after they had been held more than a month uncalled for, the liability of the carrier was to be determined by the terms of the bill of lading or by the more limited liability of a warehouseman. Obviously there was no question in the case as to what constituted delivery, for there was no pretense of delivery, actual or constructive, and therefore the decision cannot be of service in determining this case.

The opinion of the court in this case concludes:

"The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the service incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal. See *Hutchinson on Carriers*, §§ 711, 714, 715."

I cannot find justification in the sections cited, for such a statement of the law as is here made.

Section 711 deals with the obligation to unload carload freight, and, after saying that it is "the uniform rule and custom in this country" for the consignee to unload, the only other relevant statement of the writer is:

"All, therefore, that can be required of the railroad company, is that it shall place the cars where they can be safely and conveniently unloaded."

This the carrier in the case before us had done to the satisfaction and acceptance of the consignee before the accident complained of.

Section 714 deals with the liability of the carrier pending removal (delivery) of the goods, and says:

"During this reasonable time [for delivery] the liability of the carrier remains unchanged; but so soon as it has elapsed he no longer stands in the relation of carrier to the goods, but in that of an ordinary bailee for hire."

The "reasonable time" here referred to is palpably that necessary for the carrier to wait before its obligation becomes that of a warehouseman when the consignee does not appear to claim the shipment; it is not applicable to the time for unloading after the property has been accepted by the consignee.

Section 715 declares that:

"If the consignee is bound to unload the goods himself from the car, it is the duty of the carrier to place the car where it can be unloaded with a reasonable degree of convenience and to furnish the consignee with safe and proper facilities for the purpose."

All of this the carrier in this case did, and the consignee not only approved as satisfactory, safe and proper, the position in which the car was placed and the facilities furnished for unloading it, but the delivery of the car was accepted and was in the actual possession and custody of the consignee for a very considerable time before the accident complained of happened. It was not in any attempt or effort on the part of the carrier to improve the unloading facilities or to assist the consignee that the damage was done, but it was the result of a tort, pure and simple — of a negligent switching operation, entirely independent of the delivery of the shipment, occurring a half hour after it had been accepted.

The delivery having been completed and accepted by the consignee, the five-day limitation, so unreasonable in itself that it has been prohibited by congressional enactment (Act March 4, 1915, 38 Stat. 1196, c. 176, § 1 [Comp. St. § 8604a]), has, in my judgment, no applicability to this case, and to bottom the conclusion announced upon the definition of "transportation" in the Hepburn Act is to convert what was intended for the protection of shippers of property in interstate commerce, into an instrument of injury and injustice.

For the reasons thus stated I dissent from the opinion and judgment of the court.

MCKENNA and BRANDEIS, JJ. concur in this dissent. DAY, J. also dissents.

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